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PROCEEDINGS IN THE

United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT

MOTION TO VACATE SUPERSEDEAS

(Filed April 13, 1932)

Now comes the Keystone Driller Company, Plaintiff below, and moves this Honorable Court:

(1) That the orders entered by the Court below on July 29, 1931 (Record, Volume II, pages 1114 and 1145) granting supersedeas to the Defendants and suspending the injunctions be vacated, and that the Court below be instructed to issue injunctions against each of the Defendants as provided in paragraphs 5 of the respective interlocutory decrees (Record, Volume II, pages 1109 and 1139); or

(2) That the Court give permission to the Plaintiff to present this Motion to the trial court and authorize the trial court to reconsider the questions of supersedeas and of issuing the injunctions in view of the changes in the situation since the time the interlocutory decrees were entered.

THE KEYSTONE DRILLER COMPANY
F. O. RICHEY,
H. F. MCNENNY,
RICHEY & WATTS,

By.....
Its Attorneys.

EXHIBIT "A"

(Memorandum on Rehearing Under Order of the Circuit Court of Appeals Entered October 15th, 1931).

Jones, J:

In this case an interlocutory decree entered in January, 1929, was affirmed November 5th, 1930. On October 15th, 1931, an order was entered by the Circuit Court of Appeals which in effect directed this Court to re-open the case for the purpose of receiving and considering testimony regarding only an alleged prior use and the suppression of evidence of one Clutter, relating thereto.

It is claimed by the defendants (appellants above) that the prior use of the rigid scoop attachment and drop bottom, for more accurate spotting, occurred at Joplin, Missouri, early in 1920; that this was made by Clutter as the result of an earlier idea in 1916; that Downie appropriated Clutter's invention and attempted to pay him for it, and for his silence in respect of the alleged prior use at Joplin, by letting Clutter have a new excavator for half price. Downie's conception date was the summer of 1920. His patent was applied for a year later and issued in October, 1924.

The evidence of prior use and alleged suppression seems to be obscure, indefinite and unsatisfactory as a basis upon which now to sustain the claims made by the defendant. It appears that Clutter now repudiates his affidavit made April 16th, 1925, that the scoop at Joplin was an abandoned experiment of no practical worth. He testifies that Downie wrote it, but that he never read it and did not know its contents. This is effectively controverted by the notary before whom he signed and swore to it. If he swore to that affidavit, his present testimony is false. His credibility, in my opinion, has been so far impaired as to effectually destroy its weight. It is idle to suppose that Clutter did not know what he had signed and agreed to with respect to the Joplin use. If he did not, he then was under no obligation of silence as far as he was concerned, and therefore under no suppressive influence. The conduct of Clutter, both before and after the Byer's suit, is of such a character that little credibility can be accorded his evidence with respect to the prior use, unless it be adequately corroborated and supported; nor is it easy to understand why Clutter took

Exhibit A

no steps to secure for himself the benefit of any novel change or attachment which he now believes was his invention. If he was told that Downie had made application for a patent on his improvement, it would seem to have been the natural thing to have raised the question then. It is inconceivable that Clutter, whose brother was an inventor of ditchers, and himself an experienced operator, would have been content to let the time go by for applying for a patent, if he thought he had invented something patentable at Joplin in 1920. In any event, the subsequent shabby treatment of him by Downie, in respect to his account and the re-possession of the machines sold to him as the price of his silence, all had transpired before the trial of the present case. Yet it seems to me he did nothing consistent with one then under no obligation to remain silent.

What has been said here is not intended as exculpation of Downie's actions. His anxiety to protect his patent led him into a maze of questionable complications and temporizing, which, in the view I take of the alleged use, were wholly unnecessary, although inexcusable. If the matter lay between Clutter and Downie, the answer would be simple; but the issue is whether the defendants have been deprived of a real defense through the wrongful conduct of both.

A great part of the evidence as to prior use depends upon recollections given in 1930 of incidents occuring in 1920, and are certainly open to serious weaknesses. I am not impressed with the independence of Hazen's recollection without the aid of adequately framed leading questions and defendant's Exhibit 26, prepared in 1929. The same may be said as to Cummings' and the Culbertson's depositions. Wallower's deposition indicates that his recollection has been somewhat clarified in 1930 over his affidavit of May, 1925, as regards the satisfactory character of the latch mechanism. From such evidence, gathered after the passage of ten years, I find myself unable to visualize a completed and successful invention at Joplin. The Barbed Wire Patent, 143 U. S. 275, 284, 289. The changes there made in the machine were not satisfactory and were not developed, in my opinion, to the point where they constituted anticipation of Downie. The drop bottom rigid scoop tried out at Joplin was not persisted in, but, on the contrary, it was abandoned five years before the evil complained of was

Exhibit A

set in motion by the affidavit of April 16th, 1925. Symington Company vs. National Malleable Castings Company, 250 U. S. 383; Buser et al vs. Novelty Tufting Machine Co., 151 Fed. 478, 492.

I am more impressed with the testimony of Oliver and the affidavit of Wallover. The defendant at first objected to the introduction of the latter, but later withdrew objections. Oliver testified that after the skimmer bucket had been converted over to a ditcher bucket, there was difficulty with the latch arrangement; that at first they tried it with the pull rope, with the man standing alongside of the machine, and that the driver on the wagon would sometimes dump it with his hands; that they used a club or stick, or repeated the first operation mentioned. To close the bottom of the bucket, it was let down to the ground; it would not close by momentum swinging. He further testified that the ditcher scoop was not rigid and was not used wherever there was rock to be excavated. The machines thus used were disposed of as skimmer buckets; that is, they were both converted back to their original state. He denied that he told Clutter that Downie was taking out or had taken out a patent on the drop bottom ditcher scoop. Wallower's affidavit, under date of May 8th, 1925, describes the changes made from the skimmer scoop to the drop bottom rigid scoop. Two machines were so changed and were tried on the job for six weeks. While the falling bottom was advantageous in discharging sticky clay, it was not sufficient to continue the use of the scoops, and the latch mechanism was never reduced to a positively acting and properly constructed form. In March or April, 1920, their use as ditchers was abandoned and both scoops were converted into skimmers and disposed of.

When the conditions of Clutter's alleged rewarded silence were, as he thought, breached by the repossession of his machine, it is difficult to believe that he would longer remain silent, if he had in truth made a prior use at Joplin of his claimed original invention.

I find that the Joplin machine was not satisfactory; that it was never perfected to the point of successfully accomplishing the result claimed for it; that it was an abandoned experiment. My conclusion is that it was not a prior use constituting an anticipation of the Downie patent. No satisfactory showing of the Joplin use appearing, there was no suppression affecting the rights

of the defendant. Upon that phase of the case, however, I find that Downie endeavored to secure for his own protection whatever rights Clutter may have had to the improvement, for the purpose of avoiding any trouble in sustaining his patent, together with the denial of prior use by Clutter. I find that Downie did not successfully accomplish this purpose; that such arrangement as was entered into with Clutter was breached prior to trial of this case, and that Clutter was under no suppressive influence or obligation at that time respecting his alleged invention or prior use. I find there was no suppression of evidence materially affecting the defendant's rights.

United States District Judge.

March 24th, 1932.

EXHIBITS "B, C and D"

Thereupon the defendant called as a witness BERNARD R. CLUTTER, who, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION by Mr. Zane:

Q. State your full name, please?
A. Bernard R. Clutter.
Q. Where do you live?
A. 17 Edgewood Court, Lakewood, New Jersey.
Q. What is your occupation?
A. Road construction.
Q. Where are you now employed?

Exhibits B, C and D Bernard R. Clutter

A. By the Liddle & Pfeiffer Company, Perth Amboy, New Jersey.

Q. Are you engaged in work, or had you been before you came here?

A. Yes, sir.

Q. And where was the work?

A. It is a country road between Perth Amboy and Woodbridge—a section of it.

Q. Have you any designated position with regard to that work? What is your duty, your position?

A. Superintendent.

Q. Superintendent of road work?

A. Yes, sir.

Q. And that is laying what kind of a road?

A. Concrete roads.

Q. Are you the same Bernard R. Clutter who testified at Toledo in the case of the Keystone Driller Company against the Osgood Company and another company. there, General Excavator Company?

A. I testified at Lakewood, not at Toledo.

Q. Yes, you gave a deposition at Lakewood?

A. Yes, sir.

Q. How many depositions did you give in that case?

A. Two.

Q. And the second deposition was given at what time, do you remember?

A. October, I believe, 1930.

Q. How old are you, Mr. Clutter?

A. Fifty.

Q. Have you been subpenaed since you came here?

A. Yes, sir.

Q. You are the same Bernard R. Clutter who testified in your first deposition about a certain scoop which was used on a ditcher at Joplin, Missouri? You are the same man, aren't you?

A. Yes, sir.

Q. Now, where were you employed after you finished that job of excavating at Joplin, Missouri,—where you used the scoop on the excavator?

A. I took a contract for loading cinders on the Missouri Pacific Railroad, Caney, Kansas.

Q. How long were you there?

A. Possibly a month or so, maybe two or three months; I am not sure.

Q. And then where did you go?

A. I received a wire from the Keystone Driller Company asking if I would consider the proposition of going to the Trinidad Island down just off the South American coast, for the purpose of erecting and starting some machinery that they were sending down there.

Q. Was excavator machinery in that?

A. Yes, sir.

Q. And what was the result of that? Did you accept the employment and go?

A. I might state while my dealing was with the Keystone Driller Company, they informed me that I was to go down there for the Tidal Engineering Corporation of New York City, that the Tidal Engineering Corporation had asked them to secure the services of the best man available, and that they had chosen me for the job if I would accept it.

Q. In connection with what kind of machinery?

A. The Keystone excavator machinery.

Q. The Tidal Engineering Company, was that the company that had laid out the plan of work, and so on?

A. Yes, sir, they were the designers of this reclamation work in Trinidad.

Q. Well, did you go to Trinidad?

A. I did.

Q. Now, when was that?

A. That was in the summer of 1920.

Q. And how long did you stay in Trinidad?

A. I came back in, I believe it was April of 1921.

Q. Now, did you complete that work down there that you were doing in regard to the Keystone excavators?

A. I completed the work that I went down there to do; in fact, I stayed on in charge of field work for quite a while.

Q. When you got back to this country where did you go to work?

A. Well, I went up to demonstrate a machine for the Keystone Driller Company at North Dighton. I forget whether that was the first thing I did or whether that was something I did later.

The Court: Where is North Dighton?

The Witness: North Dighton is in Massachusetts near Fall River, I believe. But I forget whether that was immediately after or sometime later, but

Exhibits B, C and D Bernard R. Clutter

I went to work for J. F. Chapman of Hillside on the recommendation of the Keystone Driller Company.

Q. How long were you at that?

A. I worked for Mr. Chapman for about—well, I think about one year and during the next spring,—

Q. Next spring of what?

A. 1922, Mr. Chapman's work was very slack, and he asked me if I could rent out one of his shovels, which I did to James Wilson.

Q. When you were working for Chapman were you working for the Keystone Driller Company?

A. I was working for Mr. Chapman.

Q. Was he in connection with Keystone Driller?

A. No, I was operating Keystone shovels for Mr. Chapman. So I arranged to rent one of Mr. Chapman's machines to Mr. Wilson to do some work at Lakewood, New Jersey, and Toms River, New Jersey, and I went along with the machine under the employ; that is, I was paid by Mr. Wilson to operate Mr. Chapman's machine.

Q. How long were you there?

A. Well, I am still there in Lakewood.

Q. Lakewood and Toms River?

A. Yes. I finished the work there.

Q. After Wilson whom did you work for?

A. I went to work for myself. I purchased the machine from Mr. Wilson, one that he later bought after he had gone down to do this work, and did a little contracting in a small way.

Q. Do you know Mr. Rex Downie of the Keystone Driller Company?

A. Yes, sir.

Q. How long have you known him?

A. Possibly sixteen or seventeen years.

Q. And where did you first know him?

A. At Beaver Falls.

Q. And where was he working then?

A. Well, he is the son of Mr. Downey, who was manager of the Keystone Driller Company. When I first knew Rex he was going to school.

Q. And you have known him ever since, of course?

A. Yes. I didn't know him so well then, but I knew him, that was about all, until later Mr. Downey

had me take him out on the road to show him what I could about the shovels.

Q. Now, at any time at or near Lakewood did you see and have a talk with Mr. Rex Downey after you came back from Trinidad?

A. Sometime after I came back from Trinidad.

Q. Now, about what time was that first conversation?

A. That was in the early part of 1925.

Q. And where was it?

A. At my residence in Lakewood.

Q. Was Mr. Downey accompanied by anybody?

A. Yes, sir.

Q. Who was the man with him?

A. Mr. Elmire.

Q. Howard Elmire?

A. I believe Mr. Elmire is the man, Howard Elmire, yes.

Q. How did Mr. Downey happen to come to see you? Was it by arrangement?

A. No, I knew of no arrangement. I don't believe I knew he was coming; I am sure I didn't, but I don't think I did. I don't remember that I did know he was coming. If I did, I didn't know what it was for.

Q. Was it voluntary on his part? Had you requested it?

A. No, it was on his part.

Q. Was Mr. Elmire present while you were talking to Mr. Downey at that first conversation?

A. Well, we talked in the house; Mr. Elmire was present while we was—well, just visiting in the house, you might say.

Q. What were you talking about in the house?

A. Nothing. I don't remember; it was nothing of any importance, just in a casual way of old times.

Q. And then what took place?

A. Rex asked me—

Q. You mean Mr. Downey?

A. Yes, Rex Downey, asked me to go on the outside of the house, to take a walk out; he wanted to talk to me; which we did.

Q. Did he say anything about Elmire?

A. Well, he said this conversation was absolutely private, personal, and he didn't want anybody to know anything about it but me and him.

Q. Well, what happened then? What did you do?

A. We went on the outside of the house.

Q. Where did Elmire stay?

A. He stayed in the house.

Q. All right. You walked on the outside of the house and had a conversation?

A. Yes.

Q. Tell us what that was.

A. We walked down the yard and Mr. Downey said it was—I asked him what he wanted to see me about, and he said it was in regard to that drop bottom ditcher scoop that I had had made out at Joplin, Missouri. I asked him what about it. Well, he said they had taken out a patent on it and there was a possibility they might have to go into the courts to defend the patent on other companies who were infringing, and as I had made the first one out at Joplin, Missouri, he thought I could co operate with them in protecting the patent. I told him that if I had made the first one it was my patent and not theirs, and we had some conflab about it.

Q. Some what?

A. Well, I might say conflab or argument about it, whatever you want to call it.

Q. Tell us what was said. Tell us all you can remember.

A. And I told Mr. Downey I thought it was my invention and not their invention. Well, he said irregardless of that fact, they had a patent, and that I could co-operate with them in the protection of that patent, and he said, "Now, you know that you haven't got money to go into the courts to fight this company," and he said "I know it, too." He said, "Burn, let's be plain and talk plain." Which was facts. He said, "If there has been a wrong done let's get together and right the wrong." Then he said he had a proposition to make me. His proposition was—

Mr. Richey: Just what he said.

Q. Yes, tell us what he said.

The Court: In substance. It is not necessary for you to remember the exact words, but in substance what did he say.

A. He made me an offer that he would give me—he said he, would give me a half interest in a new machine if I would keep quiet about the thing, and in that

way I would be no operating with them. In other words, that they had the patent and they could hold it if I would keep out of the picture.

Q. You say a machine. Did he say what kind of a machine?

A. New Keystone excavator.

Q. Go on now with the conversation. What did he say to that, in substance as nearly as you can remember.

A. Well, there was nothing else to it. It was an opportunity and I grasped it to accept a half interest in a shovel, and say nothing more about the patent.

Q. Well, did you say anything about what you would do in regard to the patent? Did you say you would keep still, in other words?

A. Yes, I did. In fact, I wasn't even to tell Mr. Elmire what the business was.

The Court: Keep still about what?

The Witness: About the patent, my work of this invention that I got up at Joplin, Missouri.

The Court: At the time Downey came, you didn't know you had an invention, did you, at Joplin?

The Witness: May I make this plain to the Court?

The Court: Well, I would like to have it cleared up. You didn't seem to know when Downey came what you had at Joplin, did you?

The Witness: When I was with the Keystone Driller Company may I make this plain to the Court, Mr. Zane?

Mr. Zane: Yes, tell him why you hadn't made an application for the patent.

The Court: That would be interesting to know, why he hadn't discovered something.

Mr. Richey: We have no objection to his stating that.

The Court: We just want to know if you had anything at Joplin and if you knew you had something at Joplin, why you didn't do something about it before Downey came.

Mr. Richey: Your Honor, this is asking him for a conclusion. If I can put somebody on to contradict this point, I have no objection to his answer.

The Court: I can't make any promises in advance. We are seeking to get at the truth.

Mr. Richey: Yes, sir, but my point is this witness is not telling the truth.

The Court: That is not necessary, Mr. Richey. It won't get you a thing.

Mr. Richey: I will withdraw that remark, then, but my point is I want to put somebody on to contradict him.

The Court: Well, I won't make any promises.

Mr. Zane: Your Honor, the reason is stated in the first deposition, which is already in.

The Court: Well, if that is in, we won't need to inquire about that.

Mr. Zane: Can I state it now, what it says there? The first deposition says that the reason he hadn't applied for a patent was because back in the summer of 1920—could you turn to that? I would like to read it exactly to the Court. (Reading) "Now, Mr. Oliver that is mentioned in this answer is an officer of the Keystone Company. It was some little time after we had used the scoop on this machine, but in a conversation I informed Mr. Oliver that I was going to apply for a patent, and he informed me that the office didn't know anything about it, but that Mr. Downey had been working on or working up a drop bottom scoop prior to this operation and was filing for a patent on it or taking out a patent. He said that that office didn't know anything about that."

Q. When did this conversation with Oliver take place?

A. During the early part of the summer of 1920.

Mr. Richey: Now, we have Mr. Oliver here and he will deny that.

Mr. Zane: Well, yes, but why inject that sort of thing?

The Court: I was just curious to know why for the first time in 1925 Clutter showed any interest in securing a patent.

Q. That statement made by Mr. Oliver, did you believe what he told you?

A. I did. At the time Mr. Oliver told me this we were in the erecting room—not the erecting room—the big main building of their Joplin plant. We were on the opposite side from the office of this large building. The building is a hundred and fifty foot by three hundred, or a hundred and forty by three hundred, approximately, and we were walking towards the office, when I informed Mr. Oliver that that scoop was worth something and that I was going to apply for a patent on it.

The Court: Whereabouts are we now? Are we in New Jersey or back in Joplin?

Mr. Zane: This is at Joplin when Oliver told him this.

Q. And it was after that, in the summer of 1920, that they hired you down at Trinidad?

A. Yes, sir.

Q. Now, having cleared up that matter, we will go back to that conversation which you were having with Downey. After he said something about righting the wrong, and about your keeping still about the use out there at Joplin, what next took place?

A. I agreed to accept his proposition, his offer.

Q. What was said?

A. And I asked him should we go in the house and write a contract.

Q. You misunderstood me. You said you agreed to accept. What did you say?

A. I told him all right. That is the words, as near as I can remember.

The Court: Let me understand it. You agreed to accept a half interest in one machine, is that it?

Mr. Zane: In one machine.

The Court: And keep still?

Mr. Zane: Yes, sir.

The Court: That was the price he was surrendering his patent for, was it?

Mr. Zane: Oh, yes. The machine was worth $8200.00.

The Court: He was perfectly satisfied with a half interest in one machine to surrender his invention. Is that the force of it?

Mr. Zane: Well, that is all he thought he could get out of it. But the point is on the issue of suppression, your Honor.

The Court: I understand what you claim.

Q. You said something about drawing up a contract. What did he say?

A. He said we would have to do that later. He said there was a question as to whether there could be any contract drew up that would be of any value. If there was anything in writing it might serve to invalidate the patent.

Q. Well, what did you say to that? By the way, did you know at that time that your time for filing a patent had run out?

A. Yes, sir. I knew two years after you put the machine to work—

Q. Now, what else took place at that conversation? Did he say anything about coming back?

A. Yes, he would see what could be done about it, and see me a little later.

Q. Well, now, what was the arrangement about the machine?

A. I gave him a verbal order for the machine at that time. He said the settlement would have to be given in full for the machine.

Q. What do you mean by that?

A. Notes and mortgage for the full amount of the machine.

Q. Of the price of the machine?

A. Yes, for full price of the machine.

Q. You would give a contract?

A. I would sign a contract for the full amount, and I would have to trust to their honesty to take care of the credits.

Q. Now, did he say anything to you about saying anything to Elmire?

A. He said not to say anything to anyone.

Q. Now, what was the price of that machine?

A. The machine as ordered with the attachments was, I think it was $8240.00.

Q. Mr. Clutter, I show you a letter and ask you if you received that letter at about the time of its date?

Mr. May: The date of that is 1925?
Mr. Zane: February 11th, 1925.

A. I think—I am sure I did receive that letter.

Mr. Zane: This is not the original.

Mr. Richey: Mr. Zane, that letter wasn't submitted in connection with Mr. Clutter's deposition before, was it?

Mr. Zane: This is Defendant's Exhibit No. 95.

Mr. Richey: Yes, he is now putting in matter that wasn't put in with his deposition before.

The Court: Well, it goes here to the issue of suppression.

Mr. Richey: The same may be said to be true of witnesses we have, some of them.

Mr. Zane: No, this letter is a letter received by Mr. Clutter in regard to this matter.

The Court: All right. Go ahead.

Mr. Zane: The letter is a letter addressed to B. R. Clutter, Edgewood Court, Lakewood, New Jersey, dated February 11th, 1925, signed Keystone Driller Company, and we will have that marked Defendant's Exhibit 95. Here is a certified copy from Toledo. I guess that would be better.

The Court: Let me see it. (Examining exhibit). All right. Go ahead.

Q. I show you a letter purporting to be addressed to the Clutter Contracting Company, dated March 16th, 1925, on the letterhead of the Keystone Driller Company, which is accompanied by an invoice and a shipping receipt and bill of lading, which already bears the mark Defendant's Exhibit 37, and ask you if you received those papers?

A. Yes, sir, I received the papers. I received the machine but not all of the invoices. Part of it was shipped to Arlington later.

Mr. Zane: We will go into that. These papers have been marked Exhibit 37, the first paper is a letter to Clutter Contracting Company, signed Keystone Driller Company, R. J. Bole, and the letter recites, "We beg to hand you herewith the following papers showing shipment of machine which you ordered some days ago." Then follows the statement of the bill of lading consigned to Clutter Contracting Company. "The outfit is coming forward as you will note on Pennsylvania, car number so and so, routed Pennsylvania, Central of New Jersey. We also en-

Exhibits B, C and D — Bernard R. Clutter

close invoice in duplicate as per agreement. This machine is shop #4218. We also enclose envelope containing skis for switch on engine. Kindly ac knowledge receipt of these papers so we will know they have reached you."

Q. Had you sent any money with this order of yours for the machine?

A. I don't remember that.

Q. Well, I show you Defendant's Exhibit 99, and ask you if you received that paper?

A. That is on April 14th. I think I did receive that.

Mr. Zane: Please mark this Defendant Appellant's Exhibit 99. It is out of this book and I will have to read it.

The Court: I have a copy of it here.

Q. Now, this letter and this receipt are to the Clutter Contracting Company. Who was the Clutter Contracting Company?

A. I was trading under the name of the Clutter Contracting Company.

Mr. Zane: Shall I read this into the record out of this book, your Honor? It is just a short document and it will be convenient to have it in. (Reading) "Keystone Driller Company, Beaver Falls, Pennsylvania, New York, N. Y. Dated April 14th, 1925. We acknowledge receipt of your remittance as follows: by check #381 to apply on excavator as billed March 9, 1925, amount received $500.00. Discount, blank; interest, blank; total credit, $500.00." That is Defendant Appellant's Exhibit 99.

Q. Now, Mr. Clutter, after that first conversation with Mr. Downey which you have testified to, did you have another conversation with him?

A. Yes, sir.

Q. Now, was that before or after you received these documents in regard to the machine, if you can recall?

A. My recollection is it was before.

Q. Did you at the time you received these papers, or before that, execute the papers in regard to the purchase of the machine, namely, the contract and the promissory notes?

A. Ask that question over again.

Q. I say, did you at any time sign the papers?

A. Yes, sir.

Q. Do you know when that was, whether before or after you received notice of the shipment?

A. I believe it was before.

Q. And one of those papers was a chattel mortgage, was it?

A. I think so.

Q. And the other papers were notes?

A. Notes, yes, sir.

Q. Promissory notes?

A. I think so.

Q. You signed those?

A. That is my recollection.

Q. Prior to that, you had a second conversation with Downey. Where was that?

A. That was there at the house, at our house.

Q. The same house in Lakewood?

A. Yes.

Q. And was he accompanied by anybody at that time?

A. Yes, he was.

Q. Who was that?

A. There was a man, I didn't know who the man was at that time; I didn't remember there was anybody except one man; there may have been another man, but I am not sure; I don't remember. I think it was just this one man with him.

Q. Did you ask Downey to come to see you, or did he come of his own accord?

A. No, he came of his own accord.

Q. Now, tell us what the conversation was.

A. Well, it was in regard to writing up, drawing up any writings, something that would—well, as he called it, "tie me hand and foot,"—so I had to keep quiet. That was the words that was used."

Q. That is what he said?

A. That was the words that was used.

Q. Go on now. Was that in the presence of this man with him?

A. He had the man with him, yes.

Q. Now, go on and tell us what took place.

A. Well, let's see if I can remember. He said we would have to draw up something to show that I had abandoned the machine in the Joplin experiment, which

he called it. I told him, I mentioned the fact I didn't abandon it, didn't intend to abandon it. Well, he said we would have to show that I did abandon it. It would have to be shown as an abandoned experiment. He told the man what to write. I don't know what it was; I can't remember the words of it. I remember the substance of it.

Q. Well, what did you say?

A. Well, it was up to him for to write it. He wanted to write up something that would protect him in case anything—he said he doubted the papers could ever be used, but in case they could, he wanted something to protect himself, and so he wanted to know about the different parts of the shovel, and if there was anything—I told him we were going to make a little change on the latch. Then he said "Your latch wasn't perfected." Well, I told him we would have to make a little change on it. Then he says: "It wasn't perfected or you abandoned it, for some reason of that kind." I don't remember the words, but that was approximately.

Q. Well, the latch, was that something that could be bought?

A. Oh, it was nothing difficult about making a latch to hook the bottom with. We were busy on our work there and we didn't take time to work it out. The work was only a month or such a matter.

Q. Were there any papers drawn up there?

A. Yes, sir.

Q. Do you know how many?

A. No, I don't remember whether there was more than one or not.

Q. Well, do you remember that you signed?

A. I signed one or more papers; I don't remember.

Q. Now, you mean this is at the second conversation?

A. This is the second conversation, the second time Mr. Downey came to Lakewood to see me in regard to this thing.

Q. Now, this paper which I show you purports to be a photograph of an affidavit. Look and see if that is the thing that you signed, and if it is your signature at the bottom of it? (Handing to witness)

A. That looks like my signature. I didn't read the papers that I signed there; that is not the language I would use if I was writing it.

Q. But that is your signature?

A. It looks like my signature, yes I think it is. I didn't know it was to be an affidavit at the time I signed the papers.

Q. You say Mr. Downey drew that up there?

A. Yes, drew some papers up there and I signed it.

Q. He and the man with him?

A. He and the man with him, and I signed some papers that he drew up, and I presume that was—the papers for the purpose of tying me hand and foot, and I presume that was the papers.

Q. Did you have a copy of this paper, was a copy given to you?

A. No, sir.

Q. Did you ask for one?

A Yes, sir.

Q. What did Downey say?

A. He said they couldn't have any copies out.

Q. Did he say why?

A. Well, he said at different times that any papers out would serve to invalidate, might serve, he said to invalidate the patent, to show there was a deal existing between us.

Mr. Zane: Has your Honor a copy of this paper?

The Court: Is that the agreement?

Mr. Zane: No, sir, this is the alleged affidavit.

The Court: Is it in here?

Mr. May: It is in Volume 4, on page 1319.

Mr. Zane: I would like to direct your Honor's attention in that paper to the description of the device put in there, the one used at Joplin.

Q. Now, I show you another document that is already marked Defendant's Exhibit 98, which is unsigned, and ask you if you at that second conversation saw this document? Or was it drawn to your attention?

A. I don't think I have seen that. I don't remember that.

Q. At least, that was displayed to you at that second conversation?

A. No, I don't remember that.

Q. And you have no other recollection of it?

A. Let me see it. (Examining paper) If it had been

there I would have signed it because I just signed the papers he put down in front of me.

The Court: Your answer is, then you have no recollection of having seen that paper?

The Witness: I have no recollection of having seen that paper.

Mr. Zane: Gentlemen, will it be admitted that this paper was drawn by Mr. Downey, and that this is his writing on the paper?

Mr. May: If Mr. Clutter never saw it, what does it matter?

Mr. Zane: It matters a great deal with regard to this testimony. But I asked you if you will

Mr. Richey: Mr. Downey is here. You can put him on the stand and ask him.

The Court: It has no connection with this testimony.

Q. Now, you were not furnished any copy of that kind of a paper or of that paper?

The Court: The one he just read.

Q. I asked you if you were furnished any copy of that paper or that kind of a paper?

A. No, I am sure I was not; in fact, I don't remember any.

Q. These papers that were not signed, did they have any connection in kind with the papers that you signed for the machine, the chattel mortgage and the promissory notes?

A. No, I don't think they had any connection with that. There were no papers at that time produced to me that I remember of. I am sure in my mind that I didn't see any paper of that kind.

Q. After that conversation with Mr. Downey, did you see him again in regard to this transaction?

A. The next time I recollect of seeing Mr. Downey was when I was building a piece of road up at Roseland.

Q. Where is Roseland?

A. I had a sub-contract there for excavation. It is in northern New Jersey, west of Newark, near Caldwell, New Jersey.

Q. You were working there on a job?

A. Yes, sir.

Q. Did Mr. Downey come to see you, or did you ask him to come, or did he come of his own accord?

A. My recollection is that Mr. Elmire came out to say something about taking the machine back. We was behind on their payments; I don't remember whether Rex was with him the first time or whether he went back and Rex came back with him the second time.

Q. Before that time you say you had fallen behind on your payments had you bought any other machine?

A. Yes, sir.

Q. Now, what machine was that?

A. I bought another Keystone excavator in the year 1925, later than this one.

Q. And that was a straight out trade?

A. Straight out deal, yes, sir.

Q. And you were using both excavators in your work?

A. Yes, sir.

Q. Now, did you fall behind on both machines?

A. Yes, sir.

Q. What was the cause of that?

Mr. May: Is that material, if the Court please, what the cause was? I object to it.

The Court: Sustained.

Q. Well, tell us what took place at that conversation with Mr. Downey. What was it about Elmire? You said something about him coming first.

A. My recollection is Howard Elmire came out first, talking about the company wanted to have to get a settlement or take the machines back. I told him they better be careful about taking that one machine away from me; that was the only thing I had to realize on, and until me and Rex had a if they would leave me alone for a little while until I could get straightened out I could pay for it. So Rex came out.

Q. How soon after that?

A. Quite soon, my recollection is, and when he was talking about taking the machine away I told him we had talked that there was a little plan. I told him he had better look out, he was fooling with fire. What I mean by fire—

Mr. Richey: Wait a minute. He can say what he said, but can he say what he meant?

The Court: Well, I am interested in knowing I would like to know what he meant by it. I assume he meant he had "the goods on him" or something like that. Is that what you had in mind? You knew you had done something wrong, is that it?

The Witness: No, this is what I meant. Rex really had something I felt he was only holding by me keeping quiet, and I didn't feel he got it justly, and I felt if I gave my information out he would not be benefited.

The Court: So you were threatening him, is that it?

The Witness: No, I didn't mean it as a threat.

The Court: Well, what did you mean by "playing with fire"?

The Witness: Well, if I was questioned about it—

The Court: You weren't going to wait to be questioned, were you?

The Witness: I don't know whether I was or not. I was really trying to bluff him into leaving the machine with me until I could pay for it, as near as I can remember.

The Court: Well, go ahead.

Q. Tell us all that was said in that conversation.

A. Rex said he didn't want me to feel that way about it.

The Court: Give us the best of your recollection the substance of your conversation, what he said and what you said.

The Witness: I told him how I felt about it and he told me—

Q. Oh, begin at the beginning now. Go back in your mind to what took place, when he appeared on the scene and what did he do first. Was it something about taking back the machine?

A. He said the company was complaining very much; the notes were overdue, and something would have to be done about it; I would either have to raise some money right away or they would take the machines. And I told him I didn't see how I could raise any money, that

I wasn't getting the money out of those people, and things were in such shape I didn't see how I could raise it right away, but if he would leave me alone I would be able to pay him every cent.

Q. Did you tell him any reason why he shouldn't take the machines from you?

A. I told him then I would have lost all opportunity to realize off of my invention. Well, he said "Let's get together and work out something," or something to that effect. I don't remember the exact words. But we went over this thing together, and he decided he should pay me a cash proposition, and he offered to give me half the amount of cash that was really to have been allowed on the machines. So there was a parts account, which he thought was much higher. It actually proved to be, after we had gone over the thing and found how many parts we actually had to buy for those machines, which was comparatively new,—in fact, I think he was somewhat astounded himself, by his actions, and he agreed to cut the parts account in two, that is, fifty percent. He figured those out. Then he found the attachments I had ordered with this machine that I was to have a half interest in had been shipped to Arlington, and that I had never gone and got them. They were new and not damaged in any way, and of course I was entitled to a credit on those attachments. I don't remember just what credit he arrived at I should have on those; I am not sure; but when it was all done it was really $3808.00, to my recollection, due me as a credit on the machine.

Q. As half of it do you mean?

A. That is half of it, yes. That would have been due me as a credit.

Q. As a cash proposition?

A. As a cash proposition.

Q. Instead of a credit on the machine?

A. Yes. That is, half of $3808.00 was to be due in cash in place of $3808.00 due as a credit on the machine, which was $1904.00, and in talking over this he said, "Now, that will be nearly two thousand dollars that you will get." We figured it out and it was $1904.00 to be exact. That is my recollection.

Q. Well, when would that be paid?

A. Well, my understanding is it was after they had gotten the machine in and disposed of.

Q. That $1904.00 would be coming to you in cash?

A. In cash; yes, sir.

Q. That is what you talked over with him?

A. Yes. But later I tried to collect the $1904.00, and I wrote Rex several letters. He decided it should be cut off in two again. Then he cut it in two again; he got it down to $476.00, I believe.

The Court: Do I understand the machine was taken away?

The Witness: Yes, the machine was taken away.

Q. And did you receive any notice of the company having sold the machine, this particular machine that they had taken away from you?

A. No, I didn't receive any notice.

Q. Now, the credit of $1904.00 you say was first cut in two by him?

A. $1904.00 was not a credit. The $3808.00 was the credit I should have had, and the $1904.00 was the cash proposition that we arrived at.

Q. Cash for the credit?

A. That was the cash; that was to be the cash proposition.

Q. And the credit still remained?

A. No, if they took the machine back I was to have $1904.00 in cash.

Q. Now, did any letters pass between you and the Keystone Driller Company regarding this matter?

A. Yes, I wrote to Rex Downey several times.

Q. When was this transaction that took place at Roseland, New Jersey; what year?

A. That was 1927.

Q. What time in the year?

A. In the spring of the year.

Q. Can you come any closer than that to it?

A. Well, it was possibly April or May. I can't hardly remember just what time it was. I think it was along about that time.

Q. Now, before that time, did you receive any letter from Rex Downey? Do you remember that conversation in regard to the Joplin machine? Do you remember any?

A. I don't remember whether I did or not.

Q. Let me show you this document, Defendant's

Exhibit 27, it is marked, and ask you whether you remember receiving that letter?

A. Oh, yes, I remember this letter. I remember that letter.

Mr. Norman: That is already in. It is a part of the first Clutter deposition.

Mr. Zane: I want to direct your Honor's attention to this letter of February 20, 1926. It is an inquiry of Downey in regard to the Joplin machine.

The Court: Is it in the book of exhibits, Volume 4?

Mr. May: Volume 3, page 221.

Mr. Zane: It has a notation on it here, in the facsimile in Downey's handwriting. "Now, doggone it, Buen, come across."

The Court: All right. Go ahead.

Q. Now, was there any talk with Mr. Downey in regard to cancelling any of the notes that were on that machine?

A. Yes, sir.

Q. Well, what was that? When was that?

A. A little while before they took the machine back.

Q. When did they take the machine back?

A. They took the machine back in the early part of 1927. That is my recollection.

Q. Can you tell us what that conversation was?

A. Well, I have told you, as I understood, just what the conversation was between me and Rex at Roseland, if that is the conversation you mean.

Q. Well, let me show you a letter and ask you if you received that letter? (Handing to witness)

A. Yes, I remember receiving that letter.

Mr. May: Which letter is that?

Mr. Zane: It is the paper already marked Defendant's Exhibit 103, and I will ask to have that paper marked Defendant Appellant's Exhibit 103, and we offer that in evidence. The paper, your Honor, is dated January 15, 1927, addressed to Mr. B. R. Clutter, Edgewood Court, Lakewood, New Jersey. "Dear Sir: In connection with the arrangement about credit on the first machine purchased from us in connection with the patent litigation, would say that we have received from Beaver Falls infor-

nation that they have cancelled four of your notes due, respectively, in September, October, November and December of 1926, the amount in all $1700.00. We are now handing you these notes herewith properly cancelled. It is the writer's understanding that in case of the successful issue of our litigation there will be a further credit. This, of course, cannot be given until the cases have been decided. Yours very truly, Keystone Driller Company, by Credit Manager."

Q. Now, prior to that time, had you written a letter to Mr. Downey about the money that was coming to you? Look at that letter of January 9th. (Handing to witness)

A. This is January 9, 1928.

Q. Oh, it was after that?

A. Yes, this is after that.

Q. Did you write that letter?

A. Yes, I remember the substance of it. I wrote that letter.

Q. This letter seems to bear a notation of Mr. Downey's. You know nothing about that notation, do you?

A. No, I never seen that before. I don't remember ever seeing it.

Mr. Zane: Please mark the letter without the notation, Defendant Appellant's Exhibit 104. That is offered without the notation. Unless you want to admit Downey made that notation in that letter.

Mr. May: We will admit that.

Mr. Zane: All right, then we will offer the whole thing, notation and all.

Q. I show you a letter purporting to be addressed to yourself from the Keystone Driller Company. It has already been marked Defendant's Exhibit 105. Did you receive that letter?

A. Yes, sir.

Mr. Zane: We offer that in evidence as Defendant Appellant's Exhibit 105.

Q. Did you answer that letter?

A. I think I did.

Q. I show you Defendant's Exhibit 106 and ask

you if you wrote that letter in reply to that former letter?

A. Yes, sir.

Mr. Zane: Has your Honor copies of these letters?

The Court: Yes.

Mr. Norman: Page 1310 of Volume 4.

Mr. Zane: I offer this as Defendant Appellant's Exhibit 106.

The Court: Of course, this is long after the trial of the case, long after any question of suppression is concerned, as far as the trial of this case is concerned. It was tried in 1927.

Mr. Richey: September, 1927.

The Court: This is a year afterward.

Q. I show you a paper, a letter that has been marked Defendant's Exhibit 107, and ask you if you received that letter? (Handing to witness.)

A. Yes, I received that letter.

Mr. Zane: This letter, your Honor, we have no copy of it, and I will have to read it in the record. It is in the Court of Appeals' record in the General Excavator Company versus the Keystone Driller Company, volume 4, page 1311. It reads as follows: "Lakewood, New Jersey, February 16, 1928. Mr. Burn R. Clutter: Upon receipt of your letter of February 6 we wrote to Mr. Elmire to see whether he remembers the deal the same way that the writer does. We now have reply from Mr. Elmire in which he says that as he remembers it the understanding was that if he had to take back the first machine, and if anyone of the three things mentioned in the third paragraph of our memorandum should occur within the time limit, then a cash payment of something less than $1,000.00 was to become due. This agrees with the writer's recollection, namely, that if the machines had to be taken back and the contingency of payment should occur, then we were to pay in cash half of the amount which would have been due as a credit against machine price. (Which credit was determined to be $1904.00, making the contingent cash payment $952.00.)

"So that is the status of our deal at the present time. No one of the three things mentioned in the memorandum has happened as yet. Now, however, although you must not think that we make any offer on account of the suggested awkwardness of an examination of your accounts in any bankruptcy proceedings, for you have no actual property or credit in this contract at the present time, and therefore there is nothing in this to be listed among your assets, we now make this offer in modification of the original deal, or rather in substitution for the original deal, in view of the uncontemplated development which has occurred, namely, that we have taken back your machine:

"The contingent credit of one fourth of the purchase price of your first machine, viz. $1904.00, is displaced in the deal by a contingent cash credit of $952.00, and the verbal extensions of the time in which the contingencies named in paragraph 3 may occur with effect are hereby confirmed and further extended to the end of the year 1928; although none of these contingencies has occurred at date of this writing, we now offer in consideration of the above to now pay you half of the contingent cash sum, viz, $476.00, leaving the second half of the $476.00 cash contingent upon the development of the ditcher situation. We enclose check covering amount as offered above, which please return in case offer is not accepted.

"Now, this is the best we can do, Burn, and we certainly hope that the cash will help you out in the present circumstances. Yours truly, Keystone Driller Company."

Q. Did you receive this check that I show you, and cash it?

A. I received a check for that sum and cashed it.

Q. And deposited it? That is your signature on the back?

A. Yes. Let me see it again. (Examining document.) That is my endorsement.

Mr. Zane: We offer that check in evidence as Defendant Appellant's Exhibit 108.

Exhibits B, C and D — Bernard R. Clutter

Q. I show you a letter that has been marked Plaintiff's Exhibit C, but is also marked Defendant's Exhibit 109, and ask you if you sent that letter? There is the facsimilie.

A. Yes, sir.

Mr. Zane: This is Exhibit 109, your Honor, and is in that list somewheres. I wish your Honor would notice whether on the Exhibit 104 it has got printed on it annotations of Mr. Downey.

The Court: Yes. Exhibit 104 appears to be a letter to Downey from Clutter and the notation is incorporated.

Mr. May: Page 1303 is the notation Mr. Zane is referring to, up in the left hand corner.

The Court: Well, I assume that is what it is, but it is rather poorly printed.

Mr. Zane: And then the endorsement on the middle of the letter in Downey's handwriting, "See over," and then the endorsement at the end somewhere.

Q. Do you remember receiving a letter like that from Mr. Downey, signed for the Keystone Driller Company? (Handing to witness.)

A. Yes.

Mr. Zane: We offer this in evidence as Defendant Appellant's Exhibit 38.

Q. I show you another letter and ask you if you wrote that letter to Mr. Downey?

A. Yes, sir.

Mr. Zane: We offer this in evidence as Defendant Appellant's Exhibit 110. Have you there, your Honor, a facsimilie of Defendant's Exhibit 39?

The Court: It is printed here, a letter from Keystone, Downey to Clutter, 12-4-28.

Mr. Zane: Has it got the notation on of Downey, or annotations?

The Court: None up here in the books.

Q. I show you a letter and ask you if you received that?

A. Yes, sir.

Mr. Zane: This letter we offer in evidence as Defendant Appellant's Exhibit 39. That is page 244 of the printed record.

Mr. May: I was just wondering about Mr. Zane's question about notations. That letter was in Mr. Clutter's possession. We haven't had that letter. There couldn't be any notations on the letter if it was in Clutter's possession.

Mr. Zane: All I know it is in the record, and we can't get a photographic copy or any other kind of a copy. The original is down at Toledo; we probably could get a photographic copy there.

The Court: The point you make is there is no relevancy to the notation because it is a Clutter letter.

Mr. May: I couldn't understand the force of his comment. Mr. Downey couldn't have made any notations on that letter.

Mr. Zane: No, I was using language without thorough reflection when I was asking about notations.

Q. Defendant's Exhibit 111, look at that facsimile of that letter and see if you wrote that? (Handing to witness.)

A. Yes, that is my signature.

Mr. Zane: We offer that in evidence as Defendant Appellant's Exhibit 111.

Q. I show you a letter which is marked Defendant Exhibit 40, and ask you if you received that letter from the Keystone Company signed by Mr. Downey?

A. Yes, sir.

Mr. May: That is on page 246 of Volume 3.

Mr. Zane: We offer that letter as Defendant Appellant's Exhibit 40. Now, your Honor, in connection with a letter sent by Mr. Downey, we offer in evidence this unsigned contract form to show the document that is quoted from and the paragraphs referred to in that letter of Downey. It is marked already as Defendant's Exhibit 98, and we offer it as Defendant Appellant's Exhibit 98.

The Court: We will suspend at this time until 1:30.

Thereupon an adjournment was taken until 1:30 o'clock P. M., same day; whereupon the following proceedings were had:

Thereupon the witness, BERNARD R. CLUTTER resumed the stand for further examination, and testified as follows:

Mr. Zane: We have finished our direct examination.

CROSS EXAMINATION by Mr. Richey:

Q. Mr. Clutter, when did you first go to work for the Keystone Driller Company?

A. I think it was in 1914.

Q. And how had you been employed before that?

A. I was working at one of the trial machines on a contract basis with my brothers; my brothers and I.

Q. And where was that?

A. That was up at Wildwood, New Jersey.

Q. What kind of a machine was that?

A. That was one of the first three machines they put out.

Q. One of the Keystone machines?

A. Yes.

Q. And what had you been doing before you went to work on that machine?

A. I was in the automobile business.

Q. How long did you work for the Keystone Company when you went to work for them in 1914?

A. Approximately five years, or something like that.

Q. Up until about 1919?

A. Up until right near that. That is my recollection. It may have been the late part of 1913.

Q. Late part of 1913?

A. Yes; as I was working with the trial machine for the accomplishment of the Keystone, but really under contract and not directly for the Keystone Company.

Q. Well, what did you do when you quit their employ?

A. We went into the coal business out at Caney, Kansas,—Mr. Taylor and I.

Q. How long did you continue in that business?

Exhibits B, C and D. Bernard R. Cutter

A. Until we were flooded out and fought water as long as we had any money left.

Q. That is, that business failed, did it?

A. That business failed.

Q. Then you went to work for Wallower Brothers, didn't you?

A. Yes, I went to work after that for Wallower Brothers.

Q. How long did you work for them?

A. I don't remember just how long we went to work in the Orange company mine and one of the other mines. We took two shovels down in this open mine and we worked until the water flooded them out and they had to take their machines out.

Q. I just asked you how long you worked for them.

A. I don't remember just how long; approximately, I would say, maybe six months and maybe five months or seven months.

Q. Then they went out of the contracting business, didn't they?

A. Yes, sir.

Q. And then the Keystone Company recommended you as an operator for the South American people, is that right?

A. No, after I had been with the Wallower people I took a contract for loading cinders on the Missouri Pacific Railroad. I went over there and worked with the the car situation was such that the company was unable to furnish me cars to keep the thing running, and after loading sometimes one and two cars once in a while we would get maybe twelve or fifteen cars. I had to give the proposition up.

Q. Was it then that the Keystone recommended you as an operator?

A. Yes, sir.

Q. And then when you came back they recommended you again to the people in Massachusetts as an operator?

A. No; they sent me up in Massachusetts to demonstrate a machine up at North Dighton, but on account of the boiler failing to pass some new law they had put in effect up there, as I understand it, they wouldn't let me start the machine until certain changes were made, and I came back to Newark. I was working for Chapman.

Q. And the Keystone recommended you as an operator, didn't they, to Mr. Chapman?

A. Yes, sir; in fact, I asked him to show me where I could get a job as an operator out East. I didn't want to go back West.

Q. And the Keystone got the job for you?

A. The Keystone told me they had several operators out for Mr. Chapman, and he sent them all back and they asked me to go.

Q. Then you went in business for yourself after that, did you?

A. Yes, sir.

Q. You went along in that business until you got into financial difficulties, didn't you?

A. Yes, sir; I went on until

Q. That was when you couldn't make payments on these two machines?

A. Yes, sir.

Q. And then was when you asked the Keystone Company to help you out again, that is correct, isn't it?

A. No, I don't remember as I asked them to help me out again. I asked them to carry the one machine along until I could pay for it, but I don't remember as I asked them to help me out in any way, unless you refer to after we failed.

Q. Didn't you write to Mr. Hez Downey on January 9, 1928, to the effect that you were in dire need of funds, and were sure he was the one that could help you out, and now was the time to do it?

A. I misunderstood your question. I thought you meant to help me out when the business was failing. But this was after the business had failed and they had taken back the machines. It wasn't really to help me; it was to give me what I thought was justly coming to me. That I had reference to.

Q. You are acquainted with Mr. V. C. Smith, who is here in the court room, aren't you—V. C. Smith back here?

A. Which man do you mean? This man next to Mr. Downey?

Q. That man standing up back there. You are acquainted with him, aren't you?

A. I don't know.

Q. In a couple of letters you referred to "Mr. Smith" who was trying to collect this money from you.

A. That is this other Mr. Smith I have reference to not this Mr. Smith.

Q. You never saw this Mr. V. C. Smith?

A. I won't say I never saw him; maybe I did. I mean this Mr. Smith here that has been book keeper for the Keystone Driller Company.

Q. Didn't Mr. V. C. Smith come to you a number of times to collect this money from you on these machines?

A. I don't remember as he did.

Q. Along in 1926 and '27?

A. He possibly may have; I don't remember that he did; maybe he did.

Q. Came out of the New York office of the Keystone Company?

A. Yes, maybe he did; I won't say that he didn't.

Q. Isn't he the man that repossessed these machines?

A. I don't know. It was really agreed after the cash proposition was agreed upon.

Q. No, I asked you if he is not the man who repossessed the machines?

A. I can't say that he is.

Q. Who actually took the machines from you?

A. The agreement was entered into

Q. No; who was it?

A. I don't know who come and got the machines.

Q. You weren't there when the machines were taken?

A. I am sure I wasn't there when they come and got the machines. I know they was coming and one machine was put out on the road for them so that they could get to it. I don't know who was actually the one that came and got them.

Q. Was Mr. V. C. Smith ever in your home?

A. He may have been; I don't know whether he was or not.

Q. Were you ever in his home?

A. I don't remember; I don't remember this man V. C. Smith. I don't know; maybe he has changed his appearance or something; I don't remember the man. I won't say he wasn't in my home.

Q. Didn't he come to you in October or November, 1926, and tell you that you would have to pay up on those

machines or the company would have to take them away from you?

A. He may have.

Q. And didn't he come again a little later than that and tell you the same thing?

A. I wouldn't say whether he did or not; I can't remember.

Q. And didn't he finally come to you and tell you that they were going to take the machines away from you, and then you made this threat to him about disclosing something about Joplin, and he told you to tell anybody you wanted to tell about it? Didn't he tell you that?

A. My recollection is that Mr. Elmire came out to

Q. I am asking you about Mr. Smith. Didn't Mr. Smith tell you that?

A. I don't remember that.

Q. You don't remember that?

A. No, sir; I do not.

Q. Well, do you remember an instance when Mr. Smith and your brother Bird Clutter were looking at one of these Star machines?

Mr. Zane: When was this?

A. In Newark, it was.

Q. At what place in Newark, may I ask?

Mr. Zane: Are you talking about the brother, or what? I can't get your connection.

A. If I can get something to refresh my memory—

Q. Why, it was about the junction of Smithfield Avenue and the road that turns off to Irvington.

A. I remember when there was a Star machine out there, and I seen different people out there, and possibly Mr. Smith may have been one of them.

Q. Well, your brother, Mr. Bird C. Clutter was there, wasn't he?

A. Yes, he was there.

Q. When was that?

A. I don't remember when it was.

Q. About April, 1927, wasn't it?

A. Well, I presume it was along there when Bird had the machine out there.

Exhibits B, C and D . . Bernard R. Clutter

Q. At that time you discussed with Mr. Smith and your brother the Star machine, and also this Joplin work, didn't you the Joplin machine?

A. Well, possibly I did; I forget; possibly I did; I wouldn't say that I didn't. I don't remember whether I did or not.

Q. Your brother Bird was living at your house at that time, wasn't he, or staying with you?

A. He stayed with me there a while, but there was part of the time he didn't stay with me. I don't remember whether he stayed with me that time or not. He was stopping up at Newark at a hotel on North Broad Street a good bit of the time when he was working around Newark, and I don't remember at this particular time whether he was staying with me or not.

Q. Well, do you remember talking to him about this Joplin machine and the work done out there with it, at any other time, that is, talking with your brother Bird C. Clutter?

A. Well, we have talked this over at different times, but that particular time I don't remember. It just came up for discussion at different times.

Q. When was the first time you talked to him about it, do you remember?

A. No, I don't remember when.

Q. How often did you talk to him about it?

A. Well, I don't remember that.

Q. He knew about it, that is, you told him all about it, didn't you?

A. He knew about it; in fact, he knew about it before that.

Q. You talked to him about it before that time?

A. Yes, sir.

Q. Did you talk to him about it after that time?

A. I don't remember. I am sure we must have talked about it after that time.

Q. You also talked to your other brothers about it, didn't you,—Leroy Clutter?

A. Leroy Clutter and B. C. Clutter, I presume, at the same time. At the time that Mr. Downey and I entered into this arrangement the question came up, in fact, I brought the question up, as to whether our entering into this deal would in any way affect the Star company with their shovel, and Mr. Downey told me I didn't need to fear that; that was farthest away from it; and

I have talked that over with Roy and Bird Clutter, my brothers, and explained to them just what had been said in regards to their shovel, and what Mr. Downey had told me.

Q. I suppose you told them afterwards what Mr. Downey said about it, did you?

A. I presume I did.

Q. That would be between the time you signed that affidavit in 1925, between that time and 1929, wouldn't it?

A. Possibly.

Q. What is the nearest to the 1925 date you can place a conversation with either one of your brothers, Bird C. Clutter or Leroy Clutter, about the Joplin machine?

A. Well, I can't give you any thing on the date, but it was after Rex Downey had come to me at Lakewood in regard to entering into a deal. The facts of the matter was I felt I had lost all opportunity to realize anything out of my invention.

Q. You must have told them within the year, didn't you, because the thing they were interested in was as to whether they thought the Star would be free or not?

A. Well, I presume it was; I would judge it was within the year.

Q. You also had another brother named Lester that was working with you down at Lakewood, didn't you?

A. Yes, sir.

Q. Did you tell him about this Joplin machine, the Joplin work?

A. I don't remember whether I did or not.

Q. You saw him from day to day, didn't you?

A. Yes, sir; he worked for me.

Q. Did you tell him anything about Mr. Downey being down there and making this arrangement with you?

A. Now I don't remember whether I did or not. I possibly may have.

Q. That is, you wouldn't say you didn't talk to him about it?

A. I wouldn't say I didn't or I wouldn't say I did. I don't remember about discussing it with Lester Clutter. I do remember B. C. and R. P., my older brothers. At a later time after that we did discuss it in regard to informing them as to what Rex had told me in re-

gard to me being safe to sign the deal, as far as them being in danger of being interfered with.

Q. Do you remember that a conversation took place, a conversation where you told your two brothers about the deal you say you made with Mr. Downey?

A. No, I don't remember where that took place.

Q. Did you talk to Mr. George Wagner about it at any time?

A. At some time later, considerable time later than what I talked to Mr. Wagner.

Mr. Zane: Wait a minute. We want to object to that, your Honor. It is long after this suit was brought and decided.

The Court: Well, the trouble is that much of your correspondence occurred after the suit was filed. I suppose that has some bearing on those letters which you introduced here.

Mr. Zane: Yes; but the fact that he talked after this suit was decided about this deal is not

The Court: Oh, no, that would not be helpful in disclosing the information, if that is what you mean.

Mr. Richey: Well, read my question. (Last question read by the reporter.)

A. Yes, I think I did.

Q. When was this?

A. I don't remember just when that was.

The Court: Well, was it prior to September, 1927?

The Witness: No, I think it was later than that; that is my recollection.

Q. Was it prior to 1929?

A. I can't remember when I talked to Mr. Wagner about it.

Q. Well, didn't Mr. Wagner tell you that he had been threatened with infringement under these patents?

A. Yes, sir, that they had been warned about infringements, and my recollection is that is when we went into the proposition, and I explained to Mr. Wagner the understanding I had from Mr. Downey.

Q. And told him about the Joplin machine and the Joplin work?

A. Yes, sir, as I remember. I told him part of it, but I don't remember just how far we went into it at that time.

Q. Wasn't that in the fall of 1928, to refresh your recollection?

A. I can't remember when it was.

Q. It was prior to the time you heard of Judge Jones' decision in this Byers case, wasn't it?

A. I don't believe I knew about what the judge's decision was until sometime after the trial.

Q. Now did you talk to anybody else about this Joplin work or Joplin experiment between the time that you did the work out there and the fall of 1927, than those, you have named?

A. I don't remember whether I did or not.

The Court: I didn't hear distinctly who you said you talked with at Joplin when you were out there.

Mr. Richey: Yes, a Mr. Oliver. He is here in the court room.

Q. Did you ever talk to Mr. J. W. Matthews about this Joplin machine and Joplin work?

A. J. W. Matthews? Yes, sir.

Q. And when was that?

A. That was during the time we was getting the machine. Mr. Matthews at that time was talking about going in with me; that is, talking about forming a partnership or a stock company, and I informed Mr. Matthews about the advantage we would have on one of our machines, that we would get a percentage off. Mr. Matthews is a confidential man, in fact, a son-in-law of one of the family.

Q. Will you take down your hand?

A. (continuing) Mr. Matthews is my son-in-law. He is assistant cashier in the People's Bank—

Q. Now that I have refreshed your recollection about Mr. Matthews, can you think of any body else that you talked to about this Joplin machine or Joplin work prior to September, 1927?

A. No, sir.

Q. You wouldn't say there weren't others, would you?

A. No, I wouldn't say; I don't remember talking.

Q. And you wouldn't say there were others that you talked to about if between April, 1925 and September, 1927, would you?

A. I don't remember of talking to anyone.

Q. But you wouldn't deny that there are others?

A. Well, I wouldn't say whether I did or not; I don't remember of talking to anyone.

Q. Joplin is a town of about 35,000, or was in 1920, wasn't it?

A. Approximately that, to my recollection.

Q. And this Joplin machine and this Joplin work you did was done out in the open where any body and everybody could see it, wasn't it?

A. Yes, sir.

Q. It was close to the postoffice?

A. It was on the street—Third Street. I forget just where the postoffice is.

Mr. Zane: If your Honor please, I would like to make an objection here. As I understand the order of the Circuit Court of Appeals, they have passed upon the question of our diligence, and they have passed upon the question of this being newly discovered evidence, and therefore this examination, which is apparently in that line, is not cross-examination of this witness, and is the taking of evidence upon an issue that is not here at all.

The Court: Of course this issue is limited to the question of whether this plaintiff, the plaintiff in our case, suppressed this evidence. That is all we are considering here.

Mr. Richey: It is two questions. The question is whether the patent is invalidated by this use, and, second, whether the suppressed evidence—

The Court: You show me where that is.

Mr. Richey: I have dug out some of these things. Here is the bill of review referred to in that stipulated order, and this is addressed to the lower court in Mr. Zane's bill of review. "Wherefore the plaintiff prays that the said final decree of the said district court, after hearing the . . . bill of review, be held to be erroneous, and it ought to be reviewed, reversed and set aside, that it may be decreed that the said patent is invalid and null and void." That is addressed to the lower court; but your Honor,

this testimony here is addressed directly to the question of suppression. These people claim my client undertook to suppress something that was done out on the street where hundreds of people saw it every day, and it was a matter of common knowledge in that town and a matter of interest.

The Court: I realize it is not the question whether they attempted to suppress it as the question, did they suppress it. Of course if the information was available, even though these people thought they were suppressing it, it has not been suppressed. I think I will permit him to ask, and you may have an exception.

Q. The postoffice was directly across the street, wasn't it, from the place you were doing this work?

A. We were on Third Street. I can't remember just where the postoffice is. Possible it is right across the street.

Q. Well, there were hundreds of people came along there every day and looked at your working with this machine on that work, weren't there?

A. Yes.

Q. Mobs along there all the time, just like you see on the streets in any city where an excavation is going on?

A. Yes, sir.

Q. And you knew some of those people, didn't you?

A. Yes.

Q. Some of them were contractors and also operators?

A. There weren't so many contractors there: I don't remember whether there was any contractors there or not. There was the Keystone people from their branch up and down most every day.

Q. The Keystone Company had a western branch there at Joplin, didn't they?

A. Yes, sir.

Q. And they are the people that changed this machine over, weren't they?

A. Yes, sir.

Q. They did the work on it?

A. They did the work on it.

Q. Their people did the work on it?

A. Yes, sir.

Q. So their people were familiar with the details of construction and the change, weren't they?

A. Well, they must have been because they built just what I told them to build.

Q. Yes; Mr. Wallower was also familiar with those details, wasn't he?

A. Yes, sir.

Q. Mr. Oliver was close to the work all the time, wasn't he?

A. He was back and forth.

Q. And knew about it?

A. He knew about it; yes, sir.

Q. There was nothing concealed or secret about it, was there?

A. No, not at that time; not at that time.

Q. You have spoken of Mr. Elmire. Haven't you told Mr. Elmire about this Joplin machine and the work?

A. Yes, sir, I think so.

Q. When was the first time you told him about it?

A. Well, I believe I told Mr. Elmire, I think we talked about it—I don't remember when the first time was that we talked it over.

Q. Well, it was prior to 1925, wasn't it?

A. I don't remember.

Q. Well, you remember that you did talk to him after 1925, don't you?

A. Not for quite a while after 1925.

Q. But prior to 1927?

A. Well, possible it was along about that time.

Q. And at that time you told him it had been abandoned, didn't you?

A. No.

Q. You told him it was an experiment and had been abandoned?

A. No.

Q. You didn't tell him that?

A. I don't remember telling anybody it had been abandoned. The word "abandoned" entered into this case only when Mr. Downey was writing up something at my place.

Q. All right. It hadn't been entered into then; then it was in the case, and after that you told Mr. Elmire it had been abandoned, told him that on several occasions?

A. No, I don't remember telling him it was abandoned.

Q. You deny you told him that?

A. I don't remember telling him that.

Q. You don't deny you did tell him that?

A. I think I would remember, because the word "abandoned" was used for a particular purpose in that paper that Mr. Downey got out.

Q. Well, you told him it was an unsuccessful experiment out there, then?

A. No, I don't know why I should tell him that because it worked much better—

Q. I asked you whether you told him that?

Mr. Zane: Let him answer.

Q. I don't want your conclusion about it.

A. I don't think I told him it was abandoned. I don't see why I should tell him.

The Court: Don't give your reason. The question is whether you did or didn't.

A. I don't remember. I don't believe I did.

Q. You said that Mr. Elmire and Mr. Downey came to your house in Lakewood, New Jersey on this first trip; that is correct, isn't it?

A. Yes, sir.

Q. How many rooms have you on the lower floor of that house?

A. Three.

Q. What room did you three sit in?

A. Sitting room.

Q. Then there was a dining room, wasn't there?

A. Yes, sir.

Q. And your story is Mr. Downey called you out in the yard and you left Mr. Elmire in the house?

A. That's right.

Q. And he just sat there in the house while you all wandered about the yard?

A. That's right.

Q. Where did you go when you were out in the yard?

A. Just walked out and strolled down across the front of the yard—

Q. How long were you out there?

A. Well, I don't know; I suppose not longer than a half an hour; maybe less than that.

Q. How did they get to your house?

A. They came by car, I believe.

Q. Whose car was it?

A. My recollection is it was Mr. Elmire's car, if I am right on that; I am not sure about that; I am not positive they came by car, but my understanding is that they did; that is my recollection.

Q. How wide is your lot at the front?

A. A hundred feet.

Q. You said something about Mr. Downey said it wasn't suitable to draw up an agreement there. Didn't you have a typewriter there you could have drawn it up on?

A. No, I don't think we had any typewriter there at that time. This is the first visit, you mean, of Mr. Downey's?

Q. Yes.

A. No, there was no typewriter there; I am sure we didn't have any at the house. Now we may have had, but I forget about that. I had a typewriter there but I think it was after that.

Q. What kind of a typewriter was it?

A. I couldn't tell you.

Q. You don't remember?

A. No.

Q. How long did you have it?

A. Well, I don't remember how long we had it. We had it until after I went broke, and the fellow that had been my book-keeper come and borrowed it and didn't bring it back.

Q. How long after that was it you got this typewriter?

A. I don't remember whether this was after that I got it or before. I think it was after that.

Q. You don't remember how long after?

A. I think it was sometime in the summer, if I remember right.

Q. What summer?

A. Of 1925.

Q. Did you operate this typewriter?

A. No, sir.

Q. Who at your house did operate it?

A. A man by the name of Powers.

Q. Did he live with you?

A. No, he was my book-keeper.

Q. And you don't remember what kind it was?

A. No, sir.

Q. Now at this interview when you executed this affidavit, you said Mr. Downey wrote the affidavit up there in your house, didn't you?

A. I said they wrote up some papers there. I don't know exactly what the papers was, but I remember some of the things that was brought out, and one of the things was the abandonment.

Q. That paper was written up there, the one with the "abandonment" in?

A. Anyhow, that word was used in talking over some stuff they was writing.

Q. Tell me whether or not that paper with the "abandonment" in it was written up in the house or not?

A. No, I can't tell you that; I don't remember where it was; but I remember one conversation that word came up.

Q. All right. What papers were written up there in the house on the typewriter?

A. I don't remember.

Q. Who wrote them up?

A. I think it was this man that was with Mr. Downey.

Q. What is his name?

A. I don't remember his name.

Q. Wasn't Mr. Elmire there at the time?

A. He may have been. I won't say whether he was or not; I don't recollect.

Q. Do you know Mr. John L. Burdge?

A. Yes, sir.

Q. How long have you known him?

A. Possibly about five, maybe around five years, I presume.

Q. You know him prior to 1925, didn't you?

A. No, I don't think so; no, I didn't know him prior to that time.

Q. When did you first become acquainted with him?

A. When the man came to the house with Mr. Downey I see his name was Burdge at that time; I didn't know who the man was at that time, that Mr. Downey brought there, but I know Burdge since that time.

Q. What is his business?

A. He is a clerk in the sheriff's office there at the present time.

Q. Was he in the garage business at one time?

A. He may have been; I don't know; I didn't know if he was in the garage business.

Q. When did Mr. Downey bring Mr. Burdge to your house?

A. Well, that must have been the latter part of February. It was after this first conversation as to whether or not there could be any writings in regard to holding me.

Q. Did you ever get any licenses for your White trucks from Mr. Burdge?

A. I couldn't tell you about that; I don't remember who I got the license from; I got the license undoubtedly from the state, and who was the clerk in the office, I can't tell you.

Q. You swore to this affidavit before Mr. Burdge, didn't you, at the time you signed it?

A. I signed the papers and he put on his signature there. I have no recollection of any oath being taken; in fact, I am sure there wasn't.

Q. You are sure you didn't take an oath?

A. No, I say I have no recollection of it; I am quite sure I didn't in my own mind. I feel very sure, as nearly as I can recollect, just what took place was—when they got through they said, "Now, here, you can sign this." I signed it. Mr. Downey went up to get out the door; this man got up; I thought he was pinching these papers together with one of these riveting machines; and Mr. Rex went out the door; he said, "Now understand, there is an affidavit in these papers."

Q. What did you say to that?

A. I didn't say anything. After he was gone my wife asked me, "What did he mean by an affidavit?" And I said, "That is what I am thinking." That's the words that was used.

Q. Well, you didn't protest when he told you it was an affidavit, did you?

A. Well, it didn't dawn on me just what he had reference to. I didn't understand what he had reference to,—there was an affidavit in those papers.

Q. You didn't understand what an affidavit meant?

A. I thought you had to hold up your hand and swear when you were making an affidavit.

Q. Well, he told you it was an affidavit?

A. Just as he was going out the door. He said, "You understand there was an affidavit in those papers."

Q. And you acquiesced in it; that is, you didn't oppose it?

A. Well, I didn't understand it just thoroughly; it didn't dawn on me just what he had reference to then.

Q. Did you see Mr. Burdge put his name to the bottom of this affidavit?

A. I guess it must have been his stamp, or I guess it must have been one of these machines he was riveting the papers together with.

Q. You saw him sign it?

A. No, I didn't notice Mr. Burdge sign it.

Q. You saw him put the seal on it?

A. I saw him have some kind of tools on it. I didn't know he was putting a seal on it.

Q. What was it you saw he was putting together?

A. I thought he was punching the papers together.

Q. What, down at the bottom?

A. I didn't know it was at the bottom or top; I wasn't even looking at him.

Q. These papers may have been pinched together?

A. I don't know; I thought he was just pinching these papers together with a riveting machine. I didn't know he was a notary public.

Q. And that was when he was putting the seal on, was it?

A. He may have been putting the seal on; I wasn't looking at him; I don't know whether he was or not. In fact, I didn't know it was an affidavit at the time; it didn't dawn on me it was such a thing.

Q. You read this affidavit over before you signed it, didn't you?

A. No, sir.

Q. And it wasn't read to you?

A. No, sir. I have no recollection—I knew some of the stuff they talked over that they was going to put in, but no knowledge or thought in my mind there was any affidavit in connection with it.

Q. That is, you just signed the affidavit and never read it over?

A. He said, "Here is the papers; you can sign here," and I signed.

The Court: What papers, and why did you sign them?

The Witness: Mr. Downey explained to me they would have to get up something to tie me hand and foot, was the words he used. That was the identical words Mr. Downey used,—if such a thing was possible. He also said there was a question as to whether the papers ever could be used or not without serving to invalidate the patent.

The Court: Well, at that time you had thought you had a valuable conception, didn't you?

The Witness: At the time that I got up this invention I had carried that in my head for years before, hoping the opportune time after I had left the employ of the company would favor me so that I could actually put it to test.

The Court: But you never did anything about it until 1925?

The Witness: I built it in 1920.

The Court: And then you went to South America?

The Witness: In 1920 when I informed Mr. Oliver I was going to make application for a patent on this device, he informed me that Mr. Downey—or the home office was getting up—in fact, Rex had went up in Canada some place and built one and was making application for a patent, and that office out there didn't know anything about it, wasn't informed of it.

The Court: Didn't that alarm you with respect to your conception?

The Witness: I felt they had gotten up a drop bottom scoop before I did at that time; I really felt Mr. Oliver was telling me the facts; I lost out because I didn't invent sooner; but I felt Keystone was ahead of me.

The Court: When was the first time you found out you hadn't lost out?

The Witness: The first time Mr. Downey called me down in the yard, 1925.

The Court: When you found you hadn't yet lost out, weren't you interested in knowing what sort of bonds they were going to tie you down by, sufficiently to read the papers?

The Witness: The only thing I understood, I thought when I lost out that I couldn't do anything more about the paper, and Mr. Downey told me it would be impossible for me to fight the case with the Keystone Driller Company. He said, "You haven't the money. You know it, and so do I." He said, "If there has been a wrong done let's get together and try to right the wrong."

The Court: Well, right or wrong involved something for yourself, didn't it? That is, you felt you were entitled to something? Didn't your knowledge of your right and your desire to do something for yourself prompt you to even read the papers that were submitted to you?

The Witness: My understanding of the papers was that I was signing something that would show, as far as I was concerned, I wasn't going to ever contest their patent; that they was going into court to fight the thing, and, in other words, I would keep still and wouldn't make any outcry of being the first one to build the drop bottom ditcher scoop. In fact, when Mr. Downey informed me there I had been the first one to build the scoop, and that was why he came to me, was the first knowledge I had that they hadn't been the first one to build a scoop. That is where it actually dawned on me that they had gotten the invention unfair.

The Court: Have you ever invented anything before?

The Witness: No. Well, I say no,—we have gotten up a device for a shovel; I didn't do any of the—Mr. Wagner detailed the work and Mr. Downey made application for a patent or something on it, and brought some papers out to me to sign. It was something about some dogs on some drums; but as far as the patent itself was concerned, I wasn't in any way versed in them.

The Court: Was it your brother that had the patent on this ditching machine away back in 1915, 1919?

The Witness: Yes, that is my older brother.

Q. You told Mr. Downey that at Joplin two scoops were made in order that one might always be available as a standby to insure against delay of the job, which

might have resulted from the necessity of repair or revision, didn't you?

A. How is that? I may have told him that when we first designed the scoop. Of course we didn't know just exactly—

Q. I just asked you if you told him that?

A. I may have.

Q. Now you also told him respecting those Joplin scoops as follows: "Both scoops were in about the same stage of development; one used as ditchers was given up. Both scoops were dismantled shortly after having been used on the Joplin Supply Company job and were converted into skimmer scoops."

Mr. Zane: We object. That is stating two things. I can't discriminate one from the other.

The Court: Well, if it is separable, give it to him.

Q. Withdraw the question. You also told him prior to April 16, 1925, about these Joplin scoops as follows: "Both scoops were in about the same stage of development; one used as ditchers was given up." Didn't you?

A. No, I don't remember telling him that.

Q. You didn't tell him that?

A. I don't remember telling him that.

Q. You didn't say that?

A. I don't remember that I told him anything like that.

Q. That is true, isn't it?

A. No, I don't remember as it is. I don't believe that I told him that.

Q. You also told him as follows about those scoops: "Both scoops were dismantled shortly after having been used on the Joplin Supply Company job and were converted into skimmer scoops"?

A. I think that is what Mr. Downey got up.

Q. Well, I asked you if you told him that?

A. No, I didn't say that.

Q. Well, that is the fact, isn't it?

A. No, I don't know what happened to those scoops.

Q. You also told him as follows, didn't you, about those scoops: "Experimentation was abandoned; and so far as I was concerned, this was because of the extreme care especially the latch arrangement; and because I did

not conceive the advantage of the dumping bottom to be of sufficient practical worth to justify the expense of redesign and further experimentation which would have been necessary, in my opinion, to make the device commercially useful"?

A. The word "abandoned" was brought—

Q. Didn't you tell him what I read?

The Court: The question is, did you make such a statement as that, in substance or in words.

The Witness: No.

The Court: Nothing of the kind?

The Witness: The word "abandoned" came up—

Mr. Richey: Answer the Court's question.

Mr. Zane: Perhaps you can ask the question over again, and don't make it so long. It is not fair to the witness, if your Honor please. I think he ought to put it clause by clause.

The Court: He can't because it is all his reason.

Mr. Richey: Well, he answered that question. The question I want him to answer is the one the Court asked him.

The Court: Let him read the last paragraph of that and see whether he told Downey anything like that,—the last paragraph in that paper.

A. (after examining paper) I didn't tell Downey that. Downey told me that.

Q. That is, you never told him anything like that?

A. Yes. If you will give me permission to supply what was said; I will try to do so.

Q. The statements are not true, to be exact.

The Court: In what regard are they different, that is, the fact? Not what you said. In what respect is the fact different?

Mr. Richey: I don't want a lot of his conclusions.

The Court: No. In what respect do you say the fact was different,—not what you said. We will assume for the purpose of my question that you didn't make such a statement; but what was the fact?

The Witness: The facts of the matter was Mr. Downey was wording—

The Court: No, I don't mean about writing it. What was the fact about what you did respecting that scoop?

The Witness: Well, we just didn't go any farther with it after we got done on the job; the scoops was beyond the experimental stage.

Mr. Richey: Well, I object to that as his conclusion.

The Court: Well, in what respect? What did you do to develop it?

The Witness: We took the skimmer scoop, the scoop that works in a horizontal motion from the machine; I hooked it up on the ditcher stick to pull towards the machine, which has a drop bottom; the bottom falls down; then I blocked the link strap so that the links stood and the scoop worked in a rigid position, in place of dumping and fishing for it. It dumped with a drop bottom.

Mr. Zane: He is talking about the public use. I don't think he understood what your Honor meant.

The Witness: Didn't he ask me how it differed, in what stage of construction?

Mr. Zane: Allow me, Mr. Witness, to address the Court. That is all covered in that former

Q. Didn't you tell Mr. Elmire both scoops at Joplin were dismantled shortly after having been used on the Joplin Supply Company job and were converted into skimmer scoops?

A. Tell Mr. Elmire?

Q. Yes.

A. I have no knowledge of telling him.

Q. You didn't tell him?

A. I have no knowledge of it.

Q. You don't say whether you did nor not?

A. I don't think I did; I don't believe I did.

Q. You wouldn't say you didn't tell him?

A. I don't think I did.

Q. My question is you wouldn't say you didn't tell him?

A. I don't believe I did; I am pretty sure I didn't; I don't think there is any question about that.

Q. Didn't you tell Mr. Elmire about this Joplin work, that experimentation was abandoned out there?

A. No.

Q. You didn't tell him that?

A. No, I am sure I did not.

Q. And didn't you tell Mr. Elmire it was abandoned so far as you were concerned, because of the extreme care required to make the device as a whole operative, especially the latching arrangement?

A. There was a question came up about the latching arrangement, and they wanted to know if there was anything wrong that could say it was not perfected.

Q. I asked you if you didn't tell that to Mr. Elmire?

A. No, I don't remember telling him the words you used.

Q. Well, you told him that in substance, didn't you?

A. In substance, the only thing that wasn't practical about the scoop, we were going to make a little change in the latch.

Q. Didn't you tell Mr. Elmire, in substance, that as far as you were concerned the experimentation at Joplin was abandoned because of the extreme care required to make the device as a whole operative, especially the latching mechanism?

A. No, sir, I don't remember any words of that kind.

Q. You wouldn't say you didn't tell him?

A. I don't think I did.

Q. Didn't you tell him experimentation was also abandoned because you didn't conceive the advantage of the dumping bottom to be of sufficient practical worth to justify the expense of redesign? Didn't you tell Mr. Elmire that?

A. No, I didn't; I am sure I didn't; I don't remember about it. It is not facts; those are not facts, and that is the reason I am sure I didn't tell him.

Q. And didn't you tell him further that experimentation was abandoned because of the further experimentation which would have been necessary to make the device useful commercially? Didn't you tell him that?

A. No, I am sure I did not. I feel positive there was nothing like that come up. The fact of the matter is, it was practical outside of the latch. They asked me if it was practical, and I said, "The latch, we will make a little change there." They said if that had to be

changed it really wasn't practical. I said the latch had to be changed.

Mr. Richey: Of course I object to all this conclusion he is putting in, volunteering.

The Court: Well, go along.

Q. Did you call up anybody at the Byers Company and give your name as Bernard Ross, on the telephone?

A. Yes, sir.

Q. When was that?

A. That was in 19 I don't know; it was sometime back; I forget just when it was; back around the case, and I was going to the facts of the matter was let me see if I can tell you just when this was.

Q. About February, 1929, wasn't it?

A. Possibly it was.

Q. February or March, 1929?

A. Yes, possibly.

Q. That was after you heard Judge Jones' decision in this case, wasn't it?

A. Possibly it was, and possibly it was before. I don't remember whether it was before or after, whether I even knew about the decision. I forget about that, whether I knew about the decision at that time or not.

Q. You told him that you had some information that would be valuable to them in this case, and offered to sell it to them for a large sum of money, didn't you?

A. Yes, sir.

Q. How much did you name?

A. I don't remember how much I named, but I found out later you couldn't sell evidence, so I didn't say anything more to them about it. The fact of the matter was I thought maybe I could benefit by producing—being able to go out west and gather up evidence to substantiate the actual facts.

Q. You offered to sell them for $5000 or more,—wasn't that the figure you named?

A. Yes, that is my recollection.

Q. What was the answer they gave you? Who did you talk to first,—for the Byers Company?

A. I don't remember who I talked to. I think I talked to Mr. Beckwith, if I remember right, and Mr. Beckwith referred me, I think, to his attorneys.

Q. Mr. Fay?

A. Mr. Fay.

Q. Then you talked to Mr. Fay about it, didn't you?
A. I talked to Mr. Fay about it.
Q. Right away?
A. Yes, right away.
Q. And you told him your name was Bernard Ross?
A. Yes, sir; that's right.
Q. And you told him you had some valuable information and offered to sell it to him for five thousand dollars or more, didn't you?
A. Yes, sir.

Mr. Zane: I would like to object. He said "talked to him"; but does he mean talked with him face to face or over the telephone?

Mr. Richey: Over the telephone.

Q. That's right,—over the telephone, wasn't it?
A. Over the telephone.
Q. Did you see Mr. Fay after that?
A. No, I was going to see Mr. Fay, but I learned after that that it was illegal, I couldn't make any price like that.

The Court: Who told you that?
The Witness: I don't remember who told me.
The Court: Somebody on the street tell you?
The Witness: No; I ain't sure but what it was my brother. I found that was illegal. I didn't know about that until someone told me, so I didn't go any further with the Byers Company.

Q. Which one of your brothers told you that?
A. I think it was B. C., if I remember right; either he or Roy.

The Court: You thought it was illegal to sell it, but it wasn't right to give it?
The Witness: I didn't know it was illegal for them to pay me to look up this evidence. I was told later it was illegal.
The Court: Having found out, at least, it was illegal, did it occur to you it might be honest to give it for nothing?
The Witness: Well, it might be.

Q. You didn't give it to them for nothing, did you?
A. No.

Exhibits B, C and D — Bernard R. Clutter

Q. You went back to Mr. B. C. Clutter about it, didn't you?

A. Possibly I may. Possibly it was R. P. I talked to about it.

Q. Then Mr. B. C. Clutter and Mr. Wagner went to see the Keystone people about it, didn't they?

Mr. Zane: I object.

A. I don't know anything about that; I don't know about that.

Q. Where was it you saw B. C. Clutter that he told you you couldn't sell this testimony?

A. I don't remember whether it was B. C. or R. P.

Q. Well, where did you see the one that told you?

A. I seen the one down at Akron, and I don't remember whether I seen Roy down there or where I seen him.

Q. How soon was that after you talked to Mr. Fay?

A. Right away, I guess, if I remember right.

Q. That is, you got right on the train and went to Akron?

A. I think so.

Q. Don't you know one way or the other?

A. That is my recollection.

Q. And there you saw Mr. Wagner, didn't you?

A. Saw Mr. Wagner.

Q. And Mr. B. C. Clutter?

A. I think so.

Q. And you talked to them about this matter?

A. Yes.

Q. Did Mr. Fay tell you to come to Cleveland to see him?

A. I don't remember what Mr. Fay told me, whether he told me to come to Cleveland to see him or not, but in the meantime, whether Mr. Fay told me or whether one of them told me, anyhow, some one told me I couldn't do that; that that would be viewed upon as illegal, or something to that effect; I don't remember what it was.

Q. So you stopped in Akron and didn't come to Cleveland to proffer the information?

A. No.

Q. Do you know Mr. B. C. Clutter and Mr. Wagner went down to Beaver Falls to see the Keystone people right after that trip of yours?

A. Possibly they did.

Mr. Zane: Object and move to strike out his answer.

The Court: Yes; objection sustained.

Mr. Richey: I asked him if he knew.

The Court: What difference does it make?

Mr. Richey: It will connect up with some other testimony.

The Court: Objection sustained.

Q. Who did you next talk to about this matter of this testimony, after you talked to Mr. Wagner at Akron?

A. I don't remember. I wasn't fully informed of it. Someone had told me it was illegal, and I couldn't collect any sum of money that would be extortionate or anything like that.

Q. So your didn't take it up with anybody else?

A. I don't remember talking to anyone else.

Q. You did take it up with the Osgood people, didn't you?

A. I talked to somebody about it, but I don't remember who it was,—at Atlantic City. I don't remember if it was the Osgood, but it may have been,—talking about a ditcher scoop there and talking about this Byers case; and that was after this had happened between me and Downey, and he had taken the machine away from me, and I told as far as Downey was concerned, he was not the real inventor of the scoop.

Q. When did you first talk to the Osgood or General people about this Joplin testimony?

A. I talked to someone at the Atlantic City Road Show. That was about 1929, if I remember right.

Q. Well, they paid you, didn't they, for working on that testimony?

A. They paid me just my salary, what I was being paid on the road work.

Q. How much did they pay you?

A. I forget what the sum was, but it was approximately my salary; in fact, I think it just totaled at my salary; it was figured out as a hundred dollars a week.

Q. Did they promise to pay you anything more?

A. No, sir, they did not; in fact, they told me very plainly they could not.

Q. Has anyone else offered you anything for this testimony?

A. What do you mean?

Mr. Richey: Read it.

(Last question read by the reporter.)

A. No other companies has offered me anything. Is that what you mean?

Q. Yes.

A. No other companies has offered me anything for the testimony.

Q. Where were you when you were subpoenaed today?

A. Oh, you mean in this case here?

Q. Yes.

A. Oh, I was subpoenaed yesterday. I don't mean these companies. This company, if I understand right, they paid me for my loss; it is only just what my actual loss in time would be.

Q. Where were you when this subpoena was served on you?

A. Over in Mr. Fay's office.

Q. That is, you come up here voluntarily from New Jersey or Pennsylvania, and then they served a subpoena on you?

A. Well, I really didn't mean to come voluntarily from New Jersey; I did everything in the world to get out of this case; in fact, I avoided them in every way that was possible, and they followed me up and finally told me all right, they would like to take my deposition. My boss that I was working for, he was so much offended about it; I was drug off this work before and it meant a loss to him, and when I asked him about coming he said—

Q. Never mind that. That is, you left New Jersey and went over to Pennsylvania, didn't you?

A. Yes, sir.

Q. And then when these people got in touch with you you came on up to Cleveland, and when you got here they served a subpoena on you?

A. Yes, sir, that's right.

Q. And you wouldn't come up here until they agreed to pay you, that's right, isn't it?

A. That's right.

Q. Now you said when Mr. Downey told you the machines would be repossessed you told him wouldn't do him any good, that's correct, isn't it?

A. Yes, that's right.

Q. What did you mean by that?

A. Well, I meant if he expected me to go ahead and stay quiet and let him go ahead and protect my invention—his patent and my invention, I didn't feel I should do that.

Q. That is, you were threatening to

A. I was really meaning to try to bluff him into leaving me keep the machine until I could get it paid for; not take it away from me after I had paid them so much money on it.

Q. And you made the same threats with Mr. V. C. Smith, didn't you?

A. No, I don't remember V. C. Smith. He looks more familiar since I have seen him, but I can't—I haven't got him placed. He wasn't wearing a moustache or something, or heavier than he was.

Q. You made the same threats to somebody—

A. To somebody that was out there. I wouldn't say it wasn't even Mr. Smith here; I don't remember.

Q. And you told the people you were threatening about the Joplin work and the machine?

A. I don't remember that.

Q. You gave them the basis of your threat, didn't you?

A. I can't remember that. I can't remember I gave him the basis of the threats.

Q. What did you say to them when you threatened them?

A. I don't remember. I don't remember about any sarcasm or anything. I told Rex he had better look out, he was fooling with fire. He wanted to know what I meant by that, and I said, "I don't feel good about it, Rex,"—words similar to that.

Q. You continued to make those threats as they tried to collect the money from you?

A. I wasn't meaning it as threats; I was meaning it as facts.

Q. You meant to say they were playing with fire every time they told you to pay your bill?

A. No, sir, I didn't mean that. I meant every time they would co-opefate with me until I got the machine paid for it would compensate me for something in the loss of my invention.

Q. When did you first learn you had to file a patent

application within two years after the public use of that device?

A. I don't know. I knew that before I got the patent—before I got up this invention at Joplin, I knew after I put it to work I would have to file inside of two years.

Q. So that when Mr. Downey came to you in 1925 you knew if it was for public use anything you had would be too late to file on, didn't you?

A. Absolutely.

Q. But your knew if it was an abandoned experiment you could still file one?

A. No, sir, I didn't know that.

Q. When you went out to Joplin to see these men that testified, Mr. Culbertson and the other men, you talked to them and refreshed their recollection about this Joplin work, didn't you?

A. Possibly I did.

Q. You saw each one of them and talked to him before he testified?

A. I talked to them; I think I talked to each one of them, but it wasn't for the Osgood people that I first approached them. I went out to talk to them first before the Osgood people knew anything about it.

Q. For whom did you go the first time to talk to these people?

A. Well, at the time for the Star Driller Company—well, really for my brother. He just wanted me to collect this evidence, so if they should ever need it we would have it; not really it was supposed to be used at that time, but if there was any evidence of that kind he wanted just to collect it and we would hold it.

Q. You testified that you invented this device used at Joplin in 1916, when you were employed by the Keystone, didn't you?

A. No, sir.

Q. You didn't say that?

A. No, sir. I said I conceived the idea back in approximately 1916 or '17; but I didn't invent it or attempt to build it.

Q. Why didn't you disclose it to the Keystone people at that time?

A. Well, I didn't feel I had a chance to do that and still hold shop rights on it if I did.

Q. That is, you thought they had some rights to

it if you made some invention in their employ, and therefore concealed it from them?

A. No, sir, I didn't conceal it; I hadn't worked it out and didn't have anything except what I had in my head.

Q. You didn't tell them anything because you were afraid they would have some rights under it, isn't that it?

A. I felt if I went ahead and produced it without attempting to work it out—

Mr. Richey: Read the question.

(Last question read by the reporter.)

A. Yes, sir.

The Court: You mean you didn't want them to have any rights?

The Witness: No, I mean as long as I hadn't used any time, any of the company's time for developing something of that kind, I didn't feel there was anyone entitled to it, and I thought some time when the opportunity favored I would try and work it out. The facts of the matter is, if you try to work out something while in the company's employ, that didn't prove practical, you are subject to some undue criticism, and that was one of the reasons I made no attempt to work this thing out while I was with the company.

Q. In Exhibit 40, which is letter written from the Keystone Driller Company, Rex Downey, to you, dated Dec. 17, 1928, the following appears: "The consideration from you to us rights you might have or might have to come, arising out of your Joplin experiment; also as a part of the consideration you made affidavit as to the abandonment of that invention." You never answered that letter, did you?

A. I don't know whether I did or not; I don't remember.

Q. After receiving that letter you never denied that that was the arrangement, did you?

A. I don't remember whether I did or not. If you have the letter I can identify it.

Q. There it is right here. That is a certified copy of the letter. I guess you did identify it this morning. (Handing to witness).

Mr. Zané: It is in, yes.

Q. Well, it has been identified, Mr. Clutter?

A. Yes.

Q. When was it that you were sent out to Joplin for the Star company to talk with these witnesses out there?

A. Well, it was, you may say, indirectly for the Star company; it was some evidence; I told them about the facts of what actually took place.

Q. I asked you when it was, Mr. Clutter.

A. It must have been in 1929, I believe, as nearly as I can remember.

Q. That was after the time you had called Mr. Fay on the telephone?

A. Yes, sir.

Q. And then when was it—

A. Oh, I don't know; no, I wouldn't say it was after that. I don't know; possibly it was before that.

Q. Was it after you learned you couldn't sell this evidence for money?

A. Yes, sir; no, sir. How is that question again?

(Last question read by the reporter.)

A. It was before that.

Q. Then how long after that was it you got in touch with the Osgood people about the Joplin evidence?

A. Oh, that was—I don't know; that was when the Road Show was going on at Atlantic City. I don't remember whether it was Osgood or who I was talking to. I was talking to someone down there; I couldn't tell you whether it was Osgood or who it was.

Q. Well, you went out to Joplin again for the Osgood people, didn't you?

A. Yes, sir.

Q. And when was that?

A. That was the spring of 1930.

Q. Did you ever call anybody else up on the telephone and represent yourself to them as Bernard Ross in connection with this testimony?

A. Nobody, except I remember—I don't remember any person except the Byers people, and I didn't know yet, I didn't know where I stood. My name is Bernard Ross Clutter, and it just dawned on me when I took the telephone—

Q. Didn't you call Mr. Oliver up in Joplin and tell him your name was Bernard Ross?

A. I don't remember whether I did or not.

Q. Do you deny you did?

A. I don't know; I don't remember.

Q. You asked Mr. Oliver to come down to the telephone to see you?

A. Oh, yes; I asked him to come down to see me.

Q. And you told him over the telephone you were Bernard Ross?

A. Yes.

Q. And you offered him a position with some company, didn't you?

A. No. I told him I would intercede as best I could. I didn't offer him any position, and I had no position to offer.

Q. Didn't you tell him you were organizing a sales company to sell this shovel machinery?

A. No, we talked over if we could organize a sales company, but I didn't tell him I was organizing a sales company.

Q. You didn't tell him you were?

A. No, sir.

Q. Didn't tell him you were planning to do that?

A. No, we talked over the question whether such a thing could be done.

Q. And didn't you tell him you would give him a position with the company?

A. No, I asked him if he would be willing to accept a position with the company?

Q. Yes, at a salary of five thousand dollars a year, or something like that?

A. No, I didn't mention five thousand dollars.

Q. What salary did you mention?

A. I don't remember whether there was any salary mentioned or not, but I feel sure Mr. Oliver would not expect five thousand dollars a year. Not that he isn't a good man—

Q. Never mind; I asked you a question. Isn't it a fact that this affidavit of yours was executed by you in a Notary's office at Toms River, New Jersey?

A. No, I don't remember anything about it, any affidavit to any papers. There was some papers—I don't know—some kind of a statement or something they

wanted me to sign; but as far as being any oath administered to me, there was no oath administered to me.

Q. Didn't you sign this Defendant's Exhibit 113 in the office of Mr. Burdge at Toms River, New Jersey, in the presence of Mr. Downey and Mr. Elmire?

A. The only—

Q. Answer my question.

The Court: Did you or didn't you? What is your recollection?

A. I don't recollect as I did. I don't recollect signing any papers except the ones at Lakewood. I won't say I didn't but I don't remember about it.

Q. Well, now, following this signing of this affidavit at Toms River, didn't you and Mr. Elmire and Mr. Downey go to dinner at a restaurant in Lakewood?

A. We had dinner at a restaurant in Lakewood.

Q. Which one of the trips was that?

A. I don't remember which one it was.

Q. Wasn't that after you signed this paper here, Exhibit 113?

A. I don't remember about when I signed that—the only papers I remember signing was at my house in Lakewood. I won't say I didn't sign them, but I can't remember signing any papers at Toms River. We went around to the restaurant there in Lakewood.

Q. Just answer my questions, please. Isn't it a fact that you were given a copy of this Exhibit 98, this unsigned agreement, just before or at the time the three of you were at dinner there in that restaurant?

A. No, sir. If I had an agreement of that kind I would find it some place about my papers.

Q. And didn't you after that meal or during the meal give your copy to Mr. Elmire and tell him to keep it for you?

A. Why, I don't remember of anything of that kind.

Q. You don't deny you did do that?

A. I think I would remember if I did do that. No, I don't remember anything of that kind. I won't say I didn't, but I am sure I didn't.

Q. Didn't the three of you discuss this agreement, Exhibit 98, at that time?

A. I don't remember whether this agreement was discussed at that time or not.

Q. Well, you discussed this Joplin machine and the Joplin work at that time, didn't you?

A. Mr. Downey and I discussed it practically any time we was together, but whether it was discussed before others or not, I don't remember.

Q. Do you remember you discussed it at that time before Mr. Elmire?

A. No, I don't remember whether we did or not.

Q. Were you ever at this notary's office, Mr. Burdge's office in Toms River with Mr. Downey and Mr. Elmire?

A. I was with Mr. Downey. I don't remember whether anyone else was along or not. We went in; in fact, I went in there and introduced him to the sheriff, who is a friend of mine.

Q. Mr. Elmire was along, wasn't he?

A. He may have been. I wouldn't say whether he was or not.

Mr. Richey: That is all.

REDIRECT EXAMINATION by Mr. Zane:

Q. Mr. Cutter, I show you that affidavit that has been spoken of in the testimony, and this is an original affidavit with your signature on, isn't it?

A. It looks like it, yes. That is my signature.

Q. When did you first hear the word "experimentation" used in regard to that work out there at Joplin with that scoop?

A. When Mr. Downey was writing up those papers at my house.

Q. And who used the word?

A. Mr. Downey.

Q. Now I wish you would take this agreement, look at the last paragraph there, and read it over, and state whether or not you ever said that or in substance that to Mr. Downey?

Mr. May: This witness has said he never saw that agreement.

The Court: Yes, he was asked about that. He said he never saw it and never signed it.

Mr. May: This is the affidavit.

The Court: Oh, I beg your pardon. I thought you had that unsigned agreement.

Mr. Zane: I got it in by reference to another, but this witness was not asked about it.

The Court: I thought you had asked him previously from the affidavit.

Mr. Zane: No, the cross-examination referred to that paragraph, and the witness I didn't think explained or was allowed to explain. He was just asked certain questions, and I want to have him read that.

The Court: That last paragraph in the affidavit?

Mr. Zane: Yes.

The Court: I asked him if he said that or anything like that.

Mr. Zane: My memory is at fault, your Honor, if that is the case.

The Court: That is where I was asking the question.

The Witness: May I explain when I found this?

Q. Yes, go on and say what you can.

A. The device which was referred to when Mr. Downey was at my house to be experimentation, and I said that was past experimentation, anything except the latching,—well, the latching arrangement is mentioned in here, and I informed Mr. Downey I did intend to make a little change on the latching at the time. Then he said, well, it wasn't complete. This paragraph, I was trying to explain this last paragraph so the Court will fairly understand it.

Q. Anyway, that is Downey's language and not yours?

A. Yes, Mr. Downey got that up.

The Court: You don't remember whether that is Downey's or not, because you never saw that, you didn't read it?

The Witness: I didn't read this, no.

The Court: Then you don't know whether it is Downey's language. It is not yours, at least?

The Witness: It is not mine. I assumed it must be Mr. Downey's.

Exhibits B, C and D Bernard R. Clutter

Mr. Zane: Now your Honor, I would like to have this one identified, because here turns up an original out of the custody of the plaintiff here, and another original is down at Toledo, and it shows they had both copies of the affidavit,—the plaintiff. (Please mark this Defendant, Appellant's Exhibit 113-A.)

Q. What position did you hold in 1916 with the Keystone Driller Company?

A. 1916? Salesman and demonstrator; looking after the shovel end of the works.

Mr. Zane: That is all.

Recross Examination by Mr. Richey:

Q. You recognize Mr. V. C. Smith now, don't you?

A. Yes, I remember Mr. Smith. When I got closer to him I remembered him. I may have confused Mr. Smith with Mr. Elmire being down there. There was one of them down there; I thought it was Mr. Elmire.

Q. You remember talking with Mr. Smith about this Joplin machine and Joplin work in the spring of 1927, don't you?

A. I don't remember our conversation; I don't remember what was said to Mr. Smith.

Q. He was there when you were looking at the Star machine?

A. Well, I forget what was said; I don't remember about Mr. Smith being there. However, I remember Mr. Smith after I come closer to him.

Q. And you remember now Mr. Smith was the man that was trying to collect money from you for these ditching machines and saw you from time to time?

A. Yes.

Q. And you threatened him about disclosing this Joplin matter, didn't you?

A. No, I didn't mean to threaten anybody. I might have told him if they would take the machine away from me I would have no other way of realizing, or something like that; but I wasn't meaning to threaten.

Q. And he finally told you in the summer of 1927 you could tell who you pleased about it, didn't he?

A. I don't remember him telling me that.

Q. You don't remember him telling you that?

A. No.

Q. You don't deny that he did tell you that?

A. Well, I don't remember of him telling me that.

Q. When you were out to see Mr. Oliver you told him if the Keystone Company wouldn't sue the Star you would keep quiet about the Joplin work, didn't you?

The Court: When was that?

Q. When was that?

The Court: Or if it happened, when was it?

A. 1928, I think, wasn't it? I can't remember exactly when I was out to Joplin.

Q. Well, when you were out there you did tell him that, didn't you?

A. I don't think those were the words that was used. It wasn't our ideas to do any exposure unless the Keystone started action against the Star.

Q. Yes, and he told you the Keystone Company wasn't interested in anything of that kind, didn't he?

A. I don't remember what he told me.

Q. Well, he didn't accept your proposition?

A. What proposition?

Q. If the Keystone wouldn't sue the Star you would keep quiet?

A. Mr. Oliver didn't have anything to accept about that. Our conversation was only in a friendly way. Mr. Downey is the man in charge of that, not Mr. Oliver.

Q. Well, Mr. Oliver told you later Keystone wasn't interested in anything of that kind, didn't he?

A. No, I wouldn't say he didn't; I don't remember whether he did or not.

FURTHER REDIRECT EXAMINATION by Mr. Zane:

Q. Tell us what your conversation was with Mr. Oliver, how it came up and what it was about. Explain the whole thing.

A. There was some talk, some idea of getting up a sales force; that is, my views was to get up a sales force for selling the Star shovel, to see if we could get some territory for the Star people.

Q. What was the Star shovel?

A. The Star shovel is manufactured here at Akron; and I talked to Mr. Oliver and I was sincere in what I had to say.

Q. Who were interested in the Star shovel, any of your family?

A. Yes.

Q. Who were they?

A. Two of my brothers, Roy P. Clutter and B. C. Clutter.

Q. Anybody else?

A. That's all of my relatives.

Q. Was this man Wagner interested in the Star?

A. Mr. Wagner was interested in the Star.

Q. Now go on and tell us.

A. It wasn't authority that I was speaking from when I was talking to Mr. Oliver; it was not that my brothers had asked me to organize, but it was a conceived idea if we could get the territory and get some good loyal people together, then I would work with Mr. Oliver. I have been associated with Mr. Oliver more or less—

The Court: Is this important?

Mr. Zane: I don't know whether it is or not; I am trying to find out.

The Court: Apparently not.

Mr. Zane: We have no more testimony to offer under your Honor's ruling. This testimony here is confined to what the Courts of Appeals says, the oral testimony to be introduced by witnesses and naming the witnesses before your Honor, but if other testimony is to be gone into, then we would consider it necessary to offer testimony upon the diligence of the defendant in finding this testimony. But as I see the order, and as I see the order made in this case by your Honor, it does not contemplate anything but those depositions and the two witnesses to take oral testimony.

The Court: Well, that is all the evidence you have, then? Under this order that is all you have to offer at this time?

Mr. Zane: Yes, sir, I wouldn't want to be precluded.

The Court: Oh, no; if there is anything that gets in that is not covered by your evidence, you will have an opportunity.

Mr. Richey: If your Honor please, I have checked this back and have some more light on it.

Our first witness is Mr. V. C. Smith, who we call largely to discredit Mr. Clutter.

The Court: You have the right to do that. His credibility is open to attack.

Thereupon the plaintiff called as a witness, VELEAIR C. SMITH, who, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION by Mr. Richey:

Q. Mr. Smith, give us your full name, will you?

A. Velenir Courtlandt Smith.

Q. You reside at Lynnfield, New Jersey?

A. I do.

Q. What is your present occupation?

A. Consulting engineer and geologist, head of the V. C. Smith Management Company, managers of public utilities, oil and gas properties.

Q. Were you ever employed by the Keystone Driller Company?

A. I was.

Q. What years?

A. I could not give you—I do not remember the exact day or date of starting employ. My employment terminated about the end of 1928.

Q. You went to work about 1924, didn't you?

A. 1924-'25.

Q. You worked out of the New York office of the Keystone Driller Company?

A. I did.

Q. And one of your jobs was collecting or trying to collect money from Bernard R. Clutter, who testified here, wasn't it?

A. Yes, sir.

Q. For those two ditching machines we are talking about?

A. Yes.

Q. You reported to Mr. R. J. Bole, of the New York office of the Keystone company, didn't you?

A. I did.

Q. Did you see Mr. Bernard R. Clutter personally in your efforts to collect this money?

A. I did.

Q. About how many times did you see him in an effort to collect that money from him?

A. Over a period of time between 1926 and '27, I estimate not less than twenty times.

Q. Now take these conversations up more or less in rotation as you come to them. About when was the first conversation?

A. The first conversation, as near as I can remember, was out side of Newark; the exact locality or the name of the street I can't remember.

Q. That was about October or November, 1926, wasn't it?

A. It was in the fall of 1926.

Q. What did he say to you at that time in response to your request for the payment of the money?

Mr. Zane: We object. This is for the purpose of contradiction.

The Court: Yes, put it direct, the things which are denied.

Q. Well, did you have any conversation with Mr. Clutter at any time between 1926 and 1927, where he told you about the Joplin work and experiment?

Mr. Zane: Object.

The Court: Well, it is preliminary. He may answer.

A. I did.

Q. Who was present at that conversation besides you and Mr. Clutter?

A. At the start of one, or possibly two, of the many conversations—

Mr. Zane: We object and move to strike it out.

The Court: Yes, it ought to be directed in the usual way by counsel. The statement which was denied by Clutter should be put to the witness to see whether he made it.

The Witness: Your Honor, if someone is present for possibly five words of the conversation and then moves away, hearing only the initiation—

The Court: We don't expect you to remember every precise detail. We just want your best recollection about it.

A. Mr. Birt C. Clutter.

Q. Was that in the presence of the Star machine?

A. Yes, sir.

Q. Did Mr. B. B. Clutter at that time say to you that he had had a ditching machine at Joplin, Missouri, and had worked with it there?

A. He had talked about it previous to that.

Mr. Zane: Move to strike it out.

Q. Did he at that time?

A. He did at that time.

The Court: Clutter was asked whether or not he did not state that to Smith. He may answer.

Q. Did he at any other time say that to you?

Mr. Zane: We object. That one time was identified.

The Court: He may answer.

The Witness: May I identify the time?

The Court: Yes, if he said so at another time you may give the time.

A. The second time that I pressed Clutter for collection in the fall of 1926, he talked to me.

Mr. Zane: We object.

The Court: Well, the question is, did he tell you about the Joplin use.

The Witness: You told me to identify the time.

The Court: Well, you can identify it. When was it?

The Witness: The second time that I talked to him about a collection, in the fall of 1926.

The Court: Now the question is, did he at that time tell you about the use of the drop bottom ditcher at Joplin?

The Witness: Yes, sir.

Q. Did he come to your house at any time?

A. Yes, sir.

Q. When was that?

A. Early in '27.

Q. Did you go to his house at any time?

A. Several times.

Q. When?

A. Along about April or June of '27.

Q. Did you repossess those two machines?
A. I did.

Mr. Zane: We object. This is not rebuttal.

The Court: Well, as I recall it, Clutter said he didn't know who repossessed them. I don't know whether it is material to the case.

Mr. Zane: He said they were repossessed by somebody but he couldn't remember who it was.

Q. Did B. R. Clutter at any of these conversations tell you it would not be good for the Keystone company if they pressed him for that money?
A. Yes, sir.
Q. At which of the conversations did he tell you? Identify them by time and place, as nearly as you can.
A. From about the second time, which I have previously mentioned, the fall of 1926, through to the time I repossessed his last shovel, at almost every time I saw him personally and asked for money.
Q. Did you at any time tell him he could tell who he pleased about that Joplin work and experiment?

Mr. Zane: Object.
The Court: He may answer.

A. Yes, sir.
Q. When was that?
A. That was just prior to repossessing the second machine.
Q. And what date was it?
A. It would be about the middle of the summer of 1927, I believe.
Q. And what were your exact words, as well as you remember them,—not the substance?

Mr. Zane: We object. That is not an impeaching question.

The Court: No; you have to ask him directly, the same question that was denied by the witness.

Q. Did B. R. Clutter, in speaking of this Joplin work, tell you that more experimentation might have resulted in something?

Mr. Zane: Object.
The Court: Of course it is difficult to remem-

ber everything that was asked Clutter. I don't remember whether that was asked or not.

Mr. Zane: That question was not asked.

Mr. Richey: I don't think I asked those exact words, your Honor.

The Court: Then I will sustain the objection.

Mr. Richey: That is all I have of this witness on this specific question, your Honor. I would like to argue further our right to go into the matter more fully under this order.

The Court: What matter?

Mr. Richey: These questions involved here, that it is not limited to this specific thing. I told you about this thing, what the opinion of the Court of Appeals was. What happened was this bill of review was filed by Mr. Zane, and which I read, asking the lower court to review the question of validity of this patent, and so we went up there to Grand Rapids, and Judges Dennison and Hicks were up there, and in the argument we, the plaintiff, agreed to stipulate these depositions that have been stipulated here.

The Court: The depositions covering the question of the prior use at Joplin.

Mr. Richey: But there was one witness we didn't have at Toledo,—Mr. Oliver, who has some information on that question, and we want to put him on on that question. They were all their witnesses. It was never my understanding that anything was to be done except this matter was to be gone into by the lower court. The upper court then had the idea of splitting the question of validity; let the Master take up the question of validity and let the court take up the question of suppression of evidence. That was last June, when your Honor wouldn't get the equity cases until this winter. And then Mr. Zane and I—I prepared some stipulations and we tried to stipulate the matter; finally did prepare a stipulation and sent it on to him, in which I said there was no more testimony to be taken, taking the position Mr. Zane takes now, and he refused to sign that; and here is from his letter: "We cannot by stipulation control the Master's judicial discretion (showing conclusively that he has understood all along this thing was to be judicially considered in the lower court.) The issue of validity is referred

to him. He is to decide upon the issue. He will wish and properly wish to receive all the evidence newly discovered that bears on the issue referred to him, and by stipulation, as you suggest, we will be tying him down to say that something in the second Cutter deposition which he may say is germane is not germane, and that he is bound to reject it. But we wish the stipulation to leave open before the Master the introduction of all newly discovered evidence that bears upon the issue of validity; but you seem to be trying to narrow the evidence that can be introduced before the Master. We are willing to take his opinion." We agreed to leave out the part that the testimony was to be limited as indicated there, and the present arrangement was made by leaving that out and putting in the reference there to the bill of review, just as if the bill of review was considered, and the bill of review asks that the Court reconsider and review, lower court reconsider and review the question of the validity of the patent.

The Court: Of course you don't look to the bill of review to see what the courts do.

Mr. Richey: Well, the order said—not copying all of that bill of review; it was about forty or fifty pages long—the order said, "And the consideration of said matter will be with the same effect as if the bill of review of defendants had been entertained." There wasn't any use going and repeating the bill of review in this order; so it was summed up that way. Now we brought Mr. Oliver from Joplin, Mr. Smith from New Jersey, and several people from Beaver Falls, to go into this matter thoroughly. Mr. Oliver will testify about the Joplin use; Mr. Smith has some information along those lines, too.

The Court: Along those lines? I will let you put in evidence on the Joplin use.

Mr. Zane: If your Honor please, the stipulation that is made here—or rather it is your Honor's order—I thought that disposed of the testimony. Originally, your Honor, the stipulation that Mr. Richey wanted made was a stipulation by which certain evidence on a certain issue, that is, of suppression, should be referred to your Honor. He wanted the other question referred to the Master, and it was to

be left to the Master because the Master had the accounting before him. Now that stipulation could not be agreed upon. He on the stipulation as to the depositions would not agree; so then that was given up, and then Mr. Richey proposed an order to be signed by this court, and the stipulation to be signed by this court, and your Honor's order is—

The Court: Well, it just copies the Court of Appeals.

Mr. Zane: Now, then, the Court of Appeals evidently didn't want any evidence except on this alleged issue of suppression of evidence, and the evidence that was already shown to them on the subject of the Joplin use.

The Court: No, I don't think you can limit it to that. Listen while I read the Court of Appeals order. "On the consent of the parties hereto, it is hereby ordered that the defendant appellants be permitted to move the district court to reopen the above entitled case for the purpose of taking testimony by both defendant appellants and plaintiff appellee, regarding only, first, an alleged ditching machine and the alleged use thereof at Joplin, Missouri, referred to in certain depositions filed in the case, entitled Keystone Driller Company versus The Osgood Company," etc. Now the testimony of both parties regarding an alleged ditching machine and the alleged use thereof at Joplin, Missouri. "And, second, the alleged suppression." Now this order is issued with the understanding that the testimony to be taken hereunder will be taken before the district judge, but the said evidence contained in the deposition may be taken by stipulation, offered and received. Clearly, it seems to me any evidence bearing on the question of the use at Joplin, in addition to the depositions, should be admitted, but only that and nothing beyond that.

Mr. Zane: Then your Honor, I think it would be better if we should offer the evidence, since it says there upon the suppression of evidence, newly discovered evidence, it is incumbent upon us to show that we have exercised reasonable diligence in discovering that, and I would like to put one witness on the stand,—Mr. Fay, whom Mr. Clutter has mentioned upon the stand, and possibly Mr. Beckwith, just to

show shortly the circumstances, and the first information and the only information they got.

The Court: Well, I supposed the Court of Appeals had passed that question. That is, I would have assumed if they had wanted this court to have examined that they would have said so, because in a patent case some months ago that very thing was ordered to be done; that is, the district court was directed to consider both the question of whether diligence had been exercised, and, if it had, the reception of the newly discovered evidence. But there is nothing said about it.

Mr. Zane: They seem to take it for granted that diligence has been shown. I might say with the bill of review filed in the upper court there was contained a petition asking for it and setting forth the diligence, and the bill was accompanied by an affidavit of Mr. Fay, and all we could do here would be to put in the testimony that is contained in that affidavit and in that petition on the subject of diligence.

Mr. Richey: We have no objection to them putting in that testimony, your Honor.

The Court: All right. Go ahead.

Mr. Richey: May I finish with this witness? I want to show in his trips around the country he found this matter of this Joplin experiment and work was known to many people who talked to him about it.

The Court: Yes; that is, prior to the time—

Mr. Zane: Now, we haven't any chance to answer this.

Mr. Richey: You can put your men on. I will agree that you may do that.

(Direct Examination of Veleair Smith continued by Mr. Richey.)

Q. Did you make any trips out west between 1925 and September, 1927?

A. Yes, sir.

Q. And what was the earliest ones of those trips?

A. The latter part of '25, I believe.

Q. And did you on that trip talk with anybody about this Joplin machine and Joplin work?

A. I did.

Q. With whom?

A. Mr. Lisle Hazen, Mr. Eugene Blosser, Mr. Carter, the first name I don't know.

Q. J. L. Carter?

A. I don't remember his first name.

Q. Anybody else you remember?

A. A contractor in Tulsa, Cannady, or something like that.

Q. H. L. C-a-n-n-a-d-y?

A. I believe that is it.

Q. What did he say to you?

Mr. Zane: Object to it as hearsay.

The Court: Objection sustained.

Q. Did you also talk to Mr. Eugene Blosser?

A. I mentioned Mr. Blosser's name.

Q. Mr. H. C. Hutchison?

A. Yes.

Q. Mr. Dell Willard?

A. I am not certain of Mr. Willard, whether I am confusing him with another man who is located at the plant. I did talk with someone who was at the plant, who had been there during the time this was tried and the experiment discontinued.

Q. Have you named all you talked to on the first trip to the Joplin work or Joplin experiment?

A. I think so.

Q. When was your next trip out there?

A. Possibly four or five months later.

Q. And did you talk to anyone on that trip?

A. More or less the same men. On that particular trip I took Mr. Blosser and Mr. Hazen down to Texas to investigate the possibilities of establishing several agencies through the West.

Q. Did you talk to Mr. Ross Blake?

A. I talked to him at a bridge party one night about his watching the experiments being made.

Q. When was that?

A. That was on my first trip to Joplin. Mr. Blake was my direct superior, and former secretary.

Q. What was the date of that trip?

A. 1925, I think. I am unable to give you the dates exact.

Exhibits B, C and D — Frank Oliver

Cross Examination by Mr. Zane

Q. You talked with Lysle Hazen, you say?
A. Yes, sir.
Q. He was a man who had seen the machine actually at work?
A. Not only had seen, but according to his statements—
Q. Answer my question yes or no.
A. Yes.
Q. Who was Blosser; where did he work?
A. Keystone Driller Company.
Q. Who was Carter; where did he work?
A. At that time for the Keystone Driller Company.
Q. Who was this contractor from Tulsa?
A. Canady, beginning with "C"; I couldn't give you the exact spelling.
Q. Who was Hutchison?
A. Shovel demonstrator for the Keystone Driller Company.
Q. Who was Dell Willard?
A. The man whom I am indentifying as Dell Willard was an employee of the Keystone Driller Company.
Q. And who was Ross Blake?
A. Superintendent and general manager of a subsidiary, of the St. Joseph Lead Company.
Q. Did he have any connection with the Keystone Driller Company?
A. No.
Q. Had he seen the machine at work?
A. He had.
Q. In Joplin?
A. Yes, sir.

Mr. Zane: That is all.

Thereupon the plaintiff called as a witness Frank Oliver, who being first duly sworn, testified as follows:

Direct Examination by Mr. Richey

Q. Will you give your full name?
A. Frank Oliver.
Q. How old are you, Mr. Oliver?
A. 62.

Exhibits B, C and D — Frank Oliver

Q. You reside at Joplin, Missouri, don't you?

A. Yes, sir.

Q. And work for the Keystone Driller Company at Joplin?

A. Yes, sir.

Q. And work for the Keystone Driller Company at Joplin?

A. Yes, sir.

Q. From 1910 to 1926 you were manager of the western branch of the Keystone Driller Company at Joplin, Missouri, weren't you?

A. Yes, sir.

Q. During that period that branch was a sales office and did repair work on these excavating machines; that is correct, isn't it?

A. Yes, sir. It was from 1910 to 1916, the office was in Carthage, about sixteen miles from there; later moved over to Joplin, and established there and has been there since.

Q. Now, in 1916 you sold to the Wallower Brothers two Keystone machines that were operable either as ditchers or skimmers; that is correct, isn't it?

A. Yes, sir.

Q. That is the old Clutter ditcher?

A. Yes, sir.

Q. The Wallower Brothers were in the mining business at that time?

A. Yes, sir.

Q. And then they went into the contracting business at Joplin, Missouri?

A. Yes, sir.

Mr. Zane: I object. He is doing all the testifying.

The Court: Well, I suppose it doesn't matter. It doesn't depend on the recollection of the witness particularly.

Q. And they took a job at Joplin, Missouri, at Third and Joplin Streets; that is correct, isn't it, for the Joplin Supply Company?

A. Yes, sir.

Q. Started that work in the latter part of 1919?

A. 1919.

Q. And they were using on that work the machines which you sold them; that is correct, isn't it?

A. Yes.

Q. What kind of soil was it that they were working on on that job?

Mr. Zane: We object. This is going clearly outside of anything in the case that ought to be offered here. This is a new witness.

The Court: This is a new witness, but I understand it is limited to this alleged use at Joplin.

Mr. Richey: Exactly so.

The Court: That is the theory upon which it has been offered. You may have an exception.

Mr. Zane: Exception.

A. Why, the first two feet was loam, and after that was shale, and then it started in with yellow clay and gravel.

Q. Was it a level country or hilly country?

A. Practically level.

Q. Now, was the machine when first used on this work, a skimmer or a ditcher?

A. A skimmer.

Q. And how much of the soil was taken off with the skimmer?

A. Well, of the whole total excavation, I would say that two-thirds of it was taken out with a skimmer.

Q. And how many feet down from the surface was taken off with the skimmer?

A. Eight or ten, about nine feet at least.

Q. Was that below the shale?

A. Oh, yes.

Q. And then what change, if any, was made in the machine?

A. Well, after they abandoned the skimmer, they put on a standard ditcher.

Q. That is the standard Clutter ditcher?

A. Yes, sir.

Q. What is known as the dump scoop?

A. Dump scoop.

Q. How much of the work did they do with the ditcher when it was in that shape?

A. Oh, I should say half of what was remaining. It would be about thirteen per cent.

Q. How closely did you watch the work that was going on on this job?

A. Why, the post office was right across the street, south of this building, and it was my work to stop at the post office every morning and at noon, and also return there in the evening for the outgoing mail; so I was there three times a day practically all the time the work was going on.

Q. Were these the standard skimmer scoops that they were using on these skimmers?

A. They weren't our make; they were similar to what we were using, but they were a little larger and a little heavier.

Q. Now, did you have a conversation at any time with Mr. Herb Wallower, or anybody else in which you were asked if it was possible to put the drop bottom scoop on this ditcher?

Mr. Zane: We object as hearsay.

The Court: Yes, objection sustained.

Mr. Richey: I merely asked him if he had such a conversation.

Mr. Zane: It is immaterial whether he did or not.

Mr. Richey: Your Honor, I think that is competent to show that if there was any invention in this thing, it wasn't Mr. Clutter that did it. Of course the only way you can prove that you made an invention is by disclosure.

The Court: What Wallower told him would certainly be hearsay.

Q. Well, did you make any changes in this ditcher attachment that was being used on either one of those machines?

A. You mean change the skimmer scoop?

Q. Yes?

A. Yes, sir.

Q. And what was that change?

A. We changed the skimmer scoop over to a ditching bucket.

Mr. Zane: To what?

The Witness: To a ditching bucket; just reversed it.

Q. That is, you took off the standard Clutter scoop off the ditcher and put on one of these skimmer scoops?

A. Yes.

Q. Now, at whose suggestion was that done?

A. Herb Wallower.

Q. Where were you when the discussion was made by Mr. Wallower?

A. On the sidewalk, right where the work was being done.

Q. Just what did he say to you and what did you say to him?

Mr. Zane: We object.

The Court: Objection sustained.

Q. What was the next thing you did after that with respect to this change?

A. Well, the buckets were changed over out at our shop.

Q. Did you talk to anybody about it before you made the change?

A. Yes, I called in the superintendent.

Mr. Zane: We object.

Q. Was Mr. Bernard Clutter called in?

A. He was called up from the shovel, yes. He was operating on the shovel at the time; he was called up there to get his views of it.

Mr. Zane: I can't understand this man.

Q. That was after you talked to Mr. Wallower and the superintendent about it?

A. Yes, sir.

Q. How soon after that talk to Mr. Wallower was this change made in the ditching attachment?

A. Made that day and the following day.

Q. Who made the change?

A. It was made under Lisle Hazen's supervision at the shop.

Q. At the shop of the Keystone Driller Company?

A. Keystone Driller Company.

Q. Who were the people who made the change?

A. Well, the blacksmith and helper, and Herb Wallower came out, and also Bern' Clutter came out at different times and made the changes on the latch.

Q. What is the name of the blacksmith?

A. Clerk.

Q. He is dead now, isn't he.

A. Yes, sir.

Q. Now, after the ditcher was changed, after the ditcher stick was changed in this manner, what was done with it?

A. You mean after we finished the job?

A. Yes.

A. We brought them out to our shop, and Mr. F. C. Wallower asked me if I would help him

Mr. Zane: We object.

A. Well then, I will answer your question direct. They were changed back to their original form of skimmer scoops.

Q. Were they used in the meantime.

A. No, sir.

Q. Now, after the blacksmith and you people mounted this skimmer scoop on the ditcher, it was used on this excavation job, wasn't it?

A. Yes, sir.

Q. And did you see them use it there?

A. Yes, sir.

Q. Was it brought back to the shop at any time to be repaired or changed again?

A. Yes, sir.

Q. How often?

A. I would say at least two or three times, and then different attachments were made and taken down; in fact, I had taken some down myself in the car, and they were put on there at the job.

Q. How long did those changes continue to be made?

A. Practically all the time the work was going on while they were using this bucket, after the skimmer bucket had been converted over to the ditcher bucket.

Q. And what was the nature of the changes?

A. Principally in the latch.

Q. Now you say you saw them work with it two or three times every day while it was in use; that is what you said?

A. Yes.

Q. How did they operate it?

A. Well, they first tried it with the pull rope, a man standing alongside of the machine; but that wouldn't

work. And then the driver on the wagon would some times dump it with his hand. Then they used the club or stick, or whatever you want to call it, to unload it. Then he used a short pull rope, a man standing alongside of the wagon would jerk it. In fact they were using all those different methods up until the job was completed.

Q. How did they close the bottom of the bucket?

A. By letting it down on the ground. It would not close by momentum, by swinging.

Q. How long did they continue to operate it there?

A. Well, I think about the total job was only about 12 or 15 per cent of the total excavation that was taken out with that bucket.

Q. Well, how long with respect to the time they discontinued the use of the machine did they continue to operate it in the manner in which you have described?

A. Oh, three weeks, three or four weeks.

Q. Well, were they still operating it that way when you changed the machine back?

A. No, we changed it back to a skimmer scoop, and then they used that to finish up; we used the original skimmer scoop on the machine to finish the job.

Q. Now, at the time it was taken out to change it back to the skimmer scoop, were they still operating it by the snag closure?

A. Yes.

Q. And how were they opening it at that time for unloading it?

A. The same way, by a short pull rope or stick.

Q. Who changed it back to the skimmer scoop?

A. We did out at the shop, the Keystone Driller Company.

Q. Then you said they used that to complete the job?

A. To clean up, yes.

Q. Was any such change made in the other ditching machine that was working on the job?

A. No.

Q. That was continued to be used as the Clutter machine?

A. Yes.

Q. With the solid bucket?

A. Right.

Q. And at the same time you had this second skimmer bucket available all the time?

A. Yes.

Mr. Zane: I wish to object to this style of examination. Every question is leading and putting an answer in the mouth of the witness.

The Court: Well, it may be slightly subject to that criticism. Avoid it.

Mr. Richey: All right, sir. I was just saving time.

Q. What was the total depth of this excavation?

A. It was around twelve feet, twelve to fourteen.

Q. What was done with these two special scoops after the completion of that Joplin excavation, if you know?

A. After they were converted back to the skimmer scoop, one of them was sold, one of them went with one of the machines that Wallower sold to a man at Ardmore, Oklahoma.

Q. What became of the other one?

A. I traded on a standard ditcher bucket for the other, and it went with this Ardmore shovel; then we had kept that for some few months, I don't remember just how long, and I sold it to Rouse & Mowbridge, contractors.

Q. Do you remember the name of the Ardmore man that bought the other one?

A. No, I don't recall his name.

Q. Or was it not a skimmer scoop when the Ardmore man bought it?

A. Yes, sir.

Q. Did he buy anything else from you?

A. He bought a ditcher, the one that I had traded Wallower.

Q. A standard ditcher?

A. A standard ditcher.

Q. Did you have anything to do with making that sale?

A. Yes, I gave him the inquiry. We didn't have any used shovels at that time; so I assisted him in selling it; that is, gave him the inquiry and helped sell it and went down to his office and talked with this prospect.

Q. Now, what was the nature of the connection between the bucket and the stick with respect to rigidity

or flimsiness on this machine when this special skimmer scoop was connected on as a ditcher scoop as you saw it operating in that Joplin work?

A. Well, it wasn't right; it would sway to one side.

Mr. Zane: Swayed?

The Witness: Swayed some, yes.

Q. State whether or not you saw them using it to break in and dig in any rock?

A. No, they didn't use it for digging that. They had to blast the rock.

Q. Blasted the rock when they came to rock?

A. Yes.

Q. What if anything would happen to the latch when the ground was hit with the bucket?

A. It would fly loose.

Q. And so how did they make the contact between the bucket and the ground when they were digging?

A. They allowed it to drop down to the ground and closed it, the weight would close it.

Q. But when they started to dig or make an excavation how did they approach the ground with the bucket?

A. It would have to approach it very slow in order to keep it from opening.

Q. State whether or not that was the way they did it.

A. Practically all the time, yes.

Q. State whether or not you saw this machine with this special bucket arranged for a ditcher bucket in operation on the last day it was used at Joplin?

A. I think I did; yes, I saw it every day practically.

Q. Joplin is a town of about thirty-five thousand, isn't it?

A. Yes, sir.

Q. And state whether or not many or few people watched this use of this machine with the special scoop, arranged as a ditcher scoop.

Mr. Zane: We object to that as not within the scope of the order of the Circuit Court of Appeals.

The Court: Oh, he may answer. You may have an exception.

A. Oh, I should say there were five thousand people saw it working there during the time it was in operation, because I have seen the street lined up with people. It was in a logical place in town, right in the center of the district, right near the big hotel there, and the post office, and it was accessible to every one coming in and out of town mostly.

Q. Did you see any people there that you knew, watching this?

A. Yes, sir.

Q. State whether or not you saw any contractors or excavator machine operators?

A. Yes, I saw Henry Kost, a contractor; V. E. Koch. Then I saw Jim Alhands, of Alhands & Davis.

Q. Any others you think of?

A. I saw Scorps of Pittsburgh County, another man who came in and saw that—I don't know just how he spells that name, but I think it is S-c-o-r-p-s.

Q. Now, will you state whether or not one of your duties was to report to the main office of the Keystone Driller Company at Beaver Falls, any new developments or improvements made in their equipment?

A. Yes, sir.

Q. What if anything did you charge the Wallower Brothers for converting these scoops over to ditcher scoops?

Mr. Zane: We object as irrelevant and immaterial.

The Court: Immaterial; exception.

Mr. Richey: I think that is competent to show, your Honor, on the question of being nothing but an experiment. The purpose is to show that our company was interested in this thing as an experiment to see if it would work out. When we found it wouldn't, why, nothing was done about it.

The Court: The amount of pay wouldn't help.

Q. Well, was anything paid for that to you?

A. Not for making this experimental work.

Mr. Zane: We object and move to strike out "experimental work".

The Court: I will promise not to be prejudiced by it.

Mr. Zane: Well, it is his conclusion.

Q. Let him finish the answer.

A. I wanted to give Wallower's conversation, how it started.

The Court: You see, under the rules of evidence you cannot tell about Wallower's conversation. Just tell what you did and what was done.

The Witness: Well, we made this change to a ditcher bucket and made these different latches, and different experimental work that was going on there without any charge. When we converted them back to the skimmer bucket, we charged him for that, but nothing else.

Q. Did you report this Joplin work to the main office?

A. No, sir, I did not.

Q. Well, if it was your duty to report such things, why didn't you report that?

A. Well, it had never reached the stage where we thought—

Mr. Zane: I object and move to strike.

The Court: Not what you thought.

A. (cont'd) Never reached the stage where we thought it was a commercial proposition.

Mr. Zane: I move to strike out his answer.

The Court: It may remain. Exception.

Q. State whether or not any of these people who watched the machine work, or any one else, asked you to make any construction of such construction for them.

Mr. Zane: We object as irrelevant and immaterial.

A. Never did.

The Court: Oh, he may answer.

Q. State whether or not you or anybody under your direction as far as you know there, recommended that construction to any one else?

Mr. Zane: We object as irrelevant and immaterial.

The Court: He may answer. You may have an exception.

A. Never did.

Q. State whether or not your company continued to sell the standard Clutter ditcher attachment.

Mr. Zane: We object as irrelevant and immaterial.

The Court: Well, he may answer and you may have an exception.

A. We did.

Q. State whether or not there were at that time for your branch any prospects for excavating machinery including a ditcher attachment?

A. Yes.

Q. You know Bernard R. Clutter, don't you?

A. Yes, sir.

Q. Did you ever inform Mr. Clutter that Rex Downie had gotten up a drop-bottom ditcher scoop and was taking out or had taken out a patent on the same?

Mr. Zane: We object.

The Court: What is that?

Mr. Richey: That is contradicting Mr. Clutter, what he said yesterday.

Mr. Zane: That question wasn't put to him, I think.

Mr. Richey: I don't remember exactly the words put to him yesterday.

Mr. May: I think the Court asked the name of the man. I want to refresh the Court's memory. He asked the name of the man Mr. Clutter referred to as having talked to in Joplin. We told the Court it was Mr. Oliver. You remember that incident?

The Court: Yes.

(Question read.)

The Court: What I mean is, did you ask Clutter whether Oliver had said so?

Mr. Richey: Yes, sir.

The Court: Did Clutter deny it?

Mr. Richey: Clutter denied that Oliver told him.

The Court: Well, if that is the fact he may answer.

A. I did not.

The Court: That is the reason Clutter gave to the Court why he didn't do anything about it.

Mr. Richey: Why he didn't file a patent application.

Q. When did you first learn that Mr. Downie had a patent on this drop-bottom ditcher construction?

Mr. Zane: We object as irrelevant and immaterial.

The Court: Objection sustained.

Q. Do you remember an instance when some one called you up on the telephone and gave his name as Bernard Ross?

A. Yes, sir.

Q. When was that?

A. In 1929.

Q. And he invited you to come down to the hotel to see him, didn't he?

A. Yes.

Mr. Zane: We object as irrelevant and immaterial. If they are going to contradict Mr. Clutter they have got to put the contradicting questions to him.

Mr. Richey: Can't I lay the foundation for the questions?

The Court: Well, I suppose you can if it contradicts anything Clutter affirmed or denied. It may be put to him directly to rebut. Did Clutter deny that telephone call?

Mr. Zane: That is not the point. He was asked if he didn't say a certain thing to Mr. Oliver, and when they put that question, if they do put it, then I will object. This is positively not contradiction.

The Court: It is leading up to it, I suppose. Did he have some talk?

Mr. Richey: Yes, he went down to the hotel, and had some talk with Clutter.

The Court: Bring it down to that, to the conversation there and anything asked Clutter as having taken place.

Q. You went to the hotel, did you?

A. Yes, sir.

Q. And who did you find there?

A. B. R. Clutter.

Q. Now, did he tell you at that time that he was organizing a sales company for this ditching machinery?

A. Yes, sir.

Mr. Zane: That is not contradictory; that is affirmatory.

The Court: Yes, he said that.

Q. If he offered you a position, at what salary did he offer it?

Mr. Zane: We object.

The Court: Objection sustained.

I don't think Clutter was asked anything about that.

Mr. Richey: I think he said he didn't offer him a salary of $5,000. Clutter did say that.

Q. Well, did he offer you a salary at $5,000.00 at that time or more?

A. He said yes, that would be the salary if I accepted the position.

Q. You stated that you had Mr. Herb Wallower execute an affidavit?

A. I did.

Q. And do you remember about when that was?

A. No, I don't remember the year exactly.

Q. Will you state the circumstances under which this affidavit was executed?

Mr. Zane: We object.

The Court: What is the relevancy of that?

Mr. Richey: On this question of alleged suppression. For instance, here is an affidavit of Mr. Wallower saying that this thing was a failure and they never got it right and abandoned it. Now, if the thing was an abandoned experiment, why it would not make any difference whether any suppression or not, because it has nothing to do with this. In other words, if I take the position of counsel, and these were brought to me, these affidavits, counsel has to weed out the sheep from the goats in preparing the case on the facts to the court. After the thing is all over—it is a typical case, coming along with an old abandoned experiment and trying to make a public use of it,—all kinds of charges back and forth. And here is the thing that Mr. Downie and I acted upon in not bringing it to the

attention of plaintiff's counsel before this case was tried. Your Honor knows that plaintiff's counsel cannot come in and say, "Here, you should have relied on this; you should have relied on that,"—it would be limitless. This was to show what the situation was at that time.

The Court: Is that the way to get in the evidence, though? You don't think you can get it in that way?

Mr. Richey: I am not offering it; I am just proving the paper. It is in the Toledo case.

Mr. Zane: But this paper,—this is an *ex parte* statement made by Wallower. Wallower is a witness. Now, it has got to be offered either to contradict him or to support him, I suppose. Now, they do not show that they drew Wallower's attention to this matter and that this paper was used to contradict him. That is the only way they could bring it in.

Mr. May: If the court please, as I understand the law, any matter of report that is acted upon by any person may be offered in evidence, not as evidence of what may be in the statement, but as knowledge of what the person acted upon, such as a Dun & Bradstreet's report. It can be offered as evidence upon which a person based a certain finding. We expect to offer it later for that same purpose.

The Court: But Oliver didn't take any action on the affidavit or prepare it.

Mr. Richey: Oliver obtained it, and he executed it, and that is what we want to show.

The Court: I don't see yet how you can put the affidavit in evidence.

Mr. May: Not as to the truth of the facts in it, but as to the basis of Mr. Downie's action and the attorney's action.

Mr. Zane: Let me ask the question: Was Mr. Wallower's attention called to that when he was on the stand in the deposition?

Mr. Richey: No, this question of suppression wasn't brought out. It wasn't in issue at that time.

Mr. Zane: We are not talking about suppression; we are talking about evidence on the Joplin use.

Mr. Richey: We are talking about suppression, too.

Mr. Zane: In regard to the Joplin use, did you draw Wallower's attention to this affidavit in the Osgood case when he was on the stand?

Mr. Richey: No, we are not offering it for that purpose.

The Court: Well, I will sustain the objection. You may take an exception and put into the record what you expect to prove, and in that way you can save the question.

Mr. Richey: We offer to prove—

Mr. Zane: I think the best way is perhaps to attach the affidavit to the record.

The Court: No, they want to offer some questions about it.

Mr. Richey: We offer to prove that Mr. Oliver, this witness, received an affidavit from Beaver Falls, Pennsylvania, and went to see Mr. Wallower and showed him the form of an affidavit that had been prepared and Mr. Wallower was at a golf club and he looked the affidavit over and made certain changes in it in pencil, and then that he and Mr. Oliver—

Mr. Zane: Where is the pencil?

Mr. Richey: —went and had it rewritten into the form, including the changes that had been made by Mr. Wallower, and then Mr. Wallower executed it, before a notary. Mr. Oliver saw him sign it and saw it executed. It was then mailed to the Keystone Driller Company at Beaver Falls, and that he would identify this affidavit which I produced, dated May 8, 1925, identify it as that affidavit. And I ask that it be marked for identification as Plaintiffs' Exhibit P-73.

Mr. Zane: Well, if your Honor please, I will withdraw my objection to that, if they claim that, that any effect is to be given to it, I will withdraw my objection and let it go in, the affidavit.

Mr. Richey: Do you withdraw your objection to the testimony?

Mr. Zane: Well, I think that is, that it came from Beaver Falls and that the other that you stated, may be considered as testified to.

Mr. Richey: You have no objection to the certified copy being put in and substituted for the original?

Mr. Zane: No, not at all.

Q. Going back to this special bucket that was used as a ditcher bucket on that machine at Joplin, what if any side rake teeth did that bucket have on it when it was used?

Mr. Zane: I object as immaterial.

The Court: He may answer.

A. It didn't have any.

Q. What if any protections did it have for the pivots of the bottom.

A. It didn't have any.

Q. What kind of stick was used?

A. You mean the ditcher stick, what we call the ditcher stick?

Q. Yes.

A. Why, it was an I-beam.

Q. What was the nature of the connection between the upper end of the stick and the hoisting line?

A. I don't know as I get what you mean.

Q. Well, did they have a link connecting the upper end of the stick to the hoisting line, the upper end of the I-beam?

A. Well, they had—yes, they did, and it fastened onto the boom.

Q. Was that a straight link or angular link?

A. I couldn't say. I don't remember how that was attached.

Q. State whether or not they had at any time an automatically engaging latch on the bucket?

Mr. Zane: We object.

The Court: Is that the point involved?

Mr. Richey: That is one of the points.

Mr. Zane: It cannot be a point involved, because the latch is a mere detail of the machine.

The Court: Well, it is one of the details entering into the machine.

Mr. Richey: They never had a successful latch, and that is one of the reasons they abandoned it.

Mr. Zane: The latch is the thing they go and buy.

The Court: Yes; but a drop-bottom has to have a latch of some kind.

Mr. Zane: This did have a latch.

The Court: It has to be capable of being opened and closed.

Mr. Richey: They never had a successful latch and that is one of the reasons it was dropped.

Mr. Zane: We object, as to his conclusion as to "successful". That has nothing to do with the patent. I mean the invention, the mere success of it.

The Court: You are only talking about whether it had a latch?

Mr. Richey: That is what I asked him. He is objecting to me instead of the witness.

(Previous question read by reporter.)

Mr. Zane: We object to "automatically engaging latch".

The Court: He may answer.

A. No.

Q. I call your attention to the scoop shown in the Clutter patent 1,107,899, and ask you to state whether or not the Keystone Company ever made such a scoop as part of their commercial product.

A. No.

Mr. Richey: I think that is all.

Cross Examination by Mr. Zane:

Q. Mr. Oliver, what position did you hold in the year 1927?

A. Assistant manager.

Q. And in charge at Joplin?

A. Well, yes, as assistant, yes.

Q. And what was your next position?

A. Well, I am still there, the same position.

Q. But you were dropped, weren't you?

A. No, sir.

Q. Wasn't there a time when you weren't working for the Keytsone?

A. Absolutely not.

Q. You have been assistant Manager all the time?

A. Since 1926 or '27.

Q. And what were you—what was the time you were dropped by the Keystone?

A. I never was dropped.

Q. Were you reduced?

A. Except was reduced from manager down to assistant manager.

Q. When was that?

A. I think that was along in 1926 or 27. I had a great deal of trouble with my eyes.

Q. You were reduced to assistant manager?

A. I wasn't physically able to go ahead with the work.

Q. At the time the case was tried over at Toledo before Judge Hahn against the Osgood Company, you did not testify, did you?

A. No.

Q. And were you at that time working for the Keystone Company?

A. Yes, sir.

Q. What were you doing?

A. The same position that I have had since 1926 and '27.

Q. Assistant manager?

A. Yes.

Q. Now, you say these two machines that had been used with the pivoted buckets were disposed of?

A. Yes, sir; that is, disposed of as skimmer buckets.

Q. Do you know what became of the scoops that had been rigged up as pivoted drop-bottom scoops?

A. Yes, sir.

Q. What became of them?

A. They were both converted back to skimmer buckets in their original state.

Q. That is,—

A. After Wallower was through with them.

Q. That is, the scoops were turned into skimmers?

A. Yes, sir.

Q. And how was that done?

A. Why, just simply changing them back to their original shape.

Q. Well, you had to do some bolting?

A. Oh, yes, took these braces off that were on there.

Q. Took off what was on?

A. And put the other latches on, was the only arrangement.

Q. What became of them?

A. One of them was sold to a machine that went down to Ardmore, Oklahoma.

Q. What became of the stuff you took off?

A. Oh, I suppose it was scrapped.

Q. Did you change the ditcher stick?

A. We hadn't any occasion to change the ditcher stick.

Q. And you didn't change that?

A. No.

Q. Nothing else was changed except the scoop?

A. We didn't have any use for the ditcher stick after that.

Q. And what did you convert those ditching machines into? You say you took off the scoop and put on a skimmer. What other change at that time did you make?

A. That is all the change we made, sold them as regular excavating machines.

Q. Instroke?

A. Either instroke or outstroke. One of them went out with the skimmer bucket on and the standard ditcher.

Q. Now, you had the machinery that connected with the scoop; did that remain the same when you changed the scoop?

A. You mean the ditcher stick?

Q. Oh, yes.

A. Well, the ditcher stick was abandoned, scrapped.

Q. You took it off?

A. Yes.

Q. And put on a new one?

A. Didn't have to put on a ditcher stick on that when it was changed to a skimmer, but just simply converted.

Q. That then was a ditcher machine that a man wanted that would use a scoop?

A. Yes, sir.

Q. A skimmer scoop?

A. Yes, sir, sold as a skimmer scoop.

Q. Now you say you didn't report this thing to the head office in Beaver Falls?

A. No, sir.

Q. You didn't make any written report; is that what you mean?

A. Either written or verbal.

Q. Neither written nor verbal?

A. I wasn't down to Beaver Falls office during 1920 or 1921, a year.

Q. Did you ever tell anybody of the Keystone Company about this use of Clutter?

A. Oh, in a general way it was talked of by the men who had seen it there; but it was dropped as far as I was concerned afterwards.

Q. Did you talk about it with anybody?

A. No.

Q. Did you mention it to anybody connected with the Beaver Falls office?

A. No, sir.

Q. You saw some photographs of this scoop, didn't you?

A. Oh, I saw some kodak pictures.

Q. They are photographs?

A. Yes; so little you can't tell much about them.

Q. They were taken by Phil Culbertson?

A. Well, I think he did; I wouldn't say who did take them. There were a few taken. I don't know what became of them. They weren't considered of any value by me.

Q. Don't venture anything except what you are asked. Did you send any of those to Beaver Falls?

A. No, sir.

Q. Did anybody from Beaver Falls see any of these photographs that you know of?

A. Well, they might have seen them in the last few years.

Q. Well, at that time?

A. No, not at that time they didn't.

Q. And you don't know what became of those photographs at all?

A. No, I don't know where they are at.

Q. They were at the office of the Keystone Driller Company in Joplin, weren't they?

A. They might have been. Culbertson had them. He might have been using them, as we used photographs in our sales department.

Q. Culbertson was in your employ?

A. He was a salesman, yes.

Q. Now, you had some photographs taken yourself?

A. Absolutely not, I did not.

Q. Are you sure of that?

A. I am absolutely sure of that.

Q. Now, did you ever have any conversation with Rex Downie at all in regard to this Joplin use out there?

A. Between what years?

Q. I asked you if you ever had.

A. Oh, in the last few years, yes.

Q. When first?

A. I think it was 1921.

Q. Where?

A. At his office.

Q. At Beaver Falls?

A. Yes.

Q. What time of the year?

A. January.

Q. How long after that did you apply for the patent?

A. I couldn't tell you.

Q. Now, in January, 1921 you talked about this Joplin use to Rex Downie; is that true?

A. It might have been mentioned there; I wouldn't say we talked very much about it.

Q. Well no. But anyway you talked about it, didn't you?

A. Oh, I presume it was mentioned. We didn't go into details.

Q. What do you mean by "details"?

A. Well, the general plan of the work and how it worked, and all that.

Q. But you did tell him about what Clutter had done out there with that?

A. No, I didn't tell him what Clutter had done.

Q. But you told him about the use of that machine at Joplin?

A. I told him it had been used there; we had used such a machine.

Q. Now, you had gone on to Beaver Falls on business?

A. Sales convention, yes.

Q. Where was Rex Downie; what was he doing?

A. You mean his position at that time?

Q. Yes.

A. Why, he was assistant secretary and assistant general manager, I believe, at that time; I wouldn't say for sure.

Q. Now, who sent you that affidavit to have Wallower sign?

A. Well, of course this wasn't the original.

Q. Well, who sent you the affidavit?

Mr. Richey: Let him answer.

Q. Who sent you the affidavit?

A. Mr. Rex Downie.

Q. And it came to you as a drawn-up affidavit?

A. Subject to any change Mr. Wallower might make.

Q. And you saw that it had Downie's mark on it, an affidavit addressed to "To whom it may concern"; you noticed that, didn't you?

A. Yes.

Q. And have you ever seen an affidavit before?

A. Yes.

Q. Had you ever seen "To whom it may concern" on an affidavit before?

A. Yes.

Q. You have?

A. Yes.

Q. Where?

A. Joplin district, in the mining district there they use—

Q. Affidavit drawn up there?

A. To whom it may concern, yes.

Q. You say certain changes were made?

A. In that, yes.

Q. Before it was signed?

A. Yes, sir.

Q. Can you remember them?

A. No, I couldn't; I wouldn't attempt to say what they were. They were minor; one word changed; changed a little. Mr. Wallower and I both talked it over and made it just as though I would want to sign it myself, as he accepted it, as it happened.

Q. Now, how long did you receive this affidavit before you had it signed?

A. Oh, I think I received it one day and went down to see him in the next day or two, probably I 'phoned to him to make sure I would see him in Baxter, and just a day or two received it, and I got in touch with him.

Q. You noticed the date on the affidavit when you received it didn't you?

A. I did at the time, yes.

Q. The date was about the time you received it, wasn't it?

A. Yes.

Q. What is the date on there?

A. Well, there is no date on ours to tell what date we received it.

Q. Read that date. What is that?

A. Well, it is May 3, 1925.

Q. Then when did you have it sworn to?

A. Well, as I said, just a few days after we had received it.

Q. What is the date?

A. September 13.

Q. What year?

A. 1928.

Q. Three years between the date of the affidavit and the date it is

A. Well, as I remember it—

Mr. Richey: There is something wrong about that. That is when the commission of the Notary expired.

The Court: You have taken a lot of time about nothing.

Mr. Zane: The date is May 8. I will withdraw that.

The Court: I will exclude that so it won't confuse. The 1928 referred to is the date of the expiration of the notary's commission.

Q. Now you have testified about this machine. Have you had any practical experience with ditchers out in the field?

A. Yes, I have been selling them since the time they put them on the market.

Q. You have been selling them?

A. Yes.

Q. Have you ever used one?

A. No, I never operated one.

Q. What mechanical experience have you had?

A. Nothing more than a general observation as to the use and what is required to put them in the field.

Q. And selling the machine?

A. That is all.

Q. Never had any connection with the use of them?

A. No, I never use any.

Q. Do you know F. W. Ransom?

A. Yes, sir.

Q. What was his place at Joplin at the time this use took place, this Joplin use in 1919?

A. He never was connected with the Joplin office.

Q. Was he out there at that time?

A. Oh, he made visits out there, yes.

Q. What was his connection with the Joplin office?

A. Well, he was assistant general manager, I believe, at that time.

Q. Assistant general manager from Beaver Falls?

A. Yes, sir.

Q. Was he over you?

A. Yes, sir.

Q. And he visited there on inspections; that is F. W. Ransom?

A. Yes, sir.

Q. And that is the same F. W. Ransom who made a deposition in this case?

A. I don't know.

Q. Or in the case at Toledo?

A. I didn't know that he did.

Q. Now, Mr. Ransom, the assistant general manager from Beaver Falls, was out there and saw that machine in operation, didn't he?

A. He saw the machine in operation, but I couldn't say that we had this drop-bottom bucket there at that time.

Q. You can't say that?

A. I don't know just what time that he was there. He was there in the spring, in the winter some time during that work.

Q. But give me your best judgment as to whether he was there when the work was being done by that drop-bottom bucket, or those drop-bottom buckets.

Mr. Richey: I object to that. He said he didn't know.

A. I don't know what time of the year he was there.

Q. You couldn't form any judgment?

Mr. Richey: I object to it.

A. I said he was there during the spring; but whether or not he was there during that time or not, I couldn't say.

Exhibits B, C and D — Frank Oliver

Q. Did you talk with him about the drop-bottom bucket?

A. Not at that time.

Q. Did he say anything to you about it?

A. Not that I recollect.

Q. When did you talk with him about the drop-bottom bucket?

A. Oh, it may have been two or three years after that.

Q. Where was it?

A. Well, I couldn't tell you that, whether it was at Joplin or whether it was at Beaver Falls.

Mr. Zane: I think that is all.

RE-DIRECT EXAMINATION by Mr. Richey:

Q. You have seen this ditcher and other excavating machines operating in the field, haven't you?

A. Yes, sir.

Q. Over what period have you seen them?

A. Oh, since, I would say, 1914 or 15.

Q. Down to the present time?

A. Yes.

Q. Do you remember when the Keystone standard drop-bottom ditching machine first came out on the market?

A. Why, it was along in '15 or '16, as I recall it.

Q. No. I mean the one with the drop-bottom as distinguished from the dump-bottom.

A. But you asked about the standard.

Q. Yes.

A. Oh, the drop-bottom didn't come out until, oh, I would say it was 1923 or '24, somewhere along there. I haven't anything to fix that in my mind right now.

Q. You don't remember just when that was. Do you remember whether or not you saw any machine like that when you were in Beaver Falls in January, 1921?

A. No.

Q. Do you remember whether or not it was in the catalogue of the Keystone Driller company that came out about January, 1921?

Mr. Zane: We object. The catalogue is the better evidence.

The Court: He may answer.

A. Whether it was catalogued?
Q. Yes.
A. No.
Q. You don't remember?
A. No.

Mr. Richey: That is all.

Thereupon JOHN L. BURDGE being called as a witness by plaintiff and first duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. May:

Q. Mr. Burdge, where do you live?
A. I live in Lakewood, New Jersey.
Q. Your age, please?
A. My age, 33.
Q. And what is your occupation?
A. Chief clerk of the sheriff's office, Toms River.
Q. Do you hold any other office or commission in the State of New Jersey?
A. Notary Public.
Q. How long have you held that commission?
A. Since January, 1925.
Q. How long have you known Bernard Clutter?
A. Since about 1923.
Q. Were you intimately acquainted, associated or connected with him prior to April, 1925?
A. Not beyond both of us working for the same sheriff in the campaign; that is all, 1924.
Q. Do you recall taking an affidavit of Bernard Clutter? I show you Exhibit 113-A and 113.
A. (after examining same) I do.
Q. Is that your signature to those papers?
A. That is my signature, which was taken in duplicate, duplicate affidavits.
Q. Do you recall who was with Mr. Clutter at the time these affidavits were taken?
A. The only one I can particularly recall being in the office was former Sheriff Grant.
Q. Do you recall where that affidavit was taken?

A. It was taken in the sheriff's office at the court house at Toms River.

Q. Exhibit 113-A. I show you again the seal at the lower right hand corner, second sheet. What seal is that?

A. That is my own notorial seal.

Q. Do you recall whether there are any men in the room here that were with Mr. Clutter at that time?

A. I recall there was some men with him. There has been some men down to see me since about it, some time ago, but I don't just recall who.

Q. You wouldn't undertake to—

A. I recognize Mr. Downie as having been there once and this gentleman sitting next to him, too, but on which occasions I don't know.

Q. If Mr. Downie was in there only once, then he was there at that time; is that correct?

A. I wouldn't say. I know he was there once, but I don't whether since then or at that time.

Q. I say if he was there only once, it was at that time?

A. Yes.

Mr. Richey: The gentleman sitting next to Mr. Downie is Mr. Elmire. Just stand up. Is this the man you refer to?

The Witness: Yes.

Q. Howard Elmire. Do you remember if there were some men with Mr. Clutter at that time?

A. Yes, I do.

Q. Exhibit 113 bears the date; in whose handwriting is that?

A. That is my handwriting.

Q. And the date at the close?

A. That is my handwriting.

The Court: What is that date in each case?

The Witness: April 16.

Q. Exhibit 113 bears a similar date at the heading. In whose handwriting is that?

A. That is my writing.

Q. And at the close?

A. At the close it is somebody else's, apparently filled in before I took the affidavit.

Q. But the same date?

A. The same date, yes.

Q. Do you remember whether or not the affidavit was read to or read by Mr. Clutter before it was signed?

A. To the best of my recollection it was. In fact I wouldn't take anybody's affidavit unless the contents was known to him.

Mr. Zane: I move to strike it out, that he wouldn't take anybody's affidavit unless he read it.

The Court: Probably that is not responsive. I will exclude it.

Q. Did you administer an oath to Mr. Clutter?

A. I did.

Mr. May: That is all.

Cross Examination by Mr. Zane:

Q. You inserted the date in one of these copies?

A. I did, sir.

Q. That date is inserted in the copy marked "Defendant's Exhibit 113"?

A. Yes, sir, both those dates are in my handwriting.

Q. Who inserted the date in the other affidavit so far as you know?

The Court: You mean at the close or at the heading?

A. At the heading I did; at the bottom, I didn't; I don't know who did.

Q. It had that date in it when it came?

A. It had it in when it came.

Q. The other one didn't have the date in it when it came?

A. No, sir.

Q. Did you know that both affidavits were the same?

A. I probably did. I did, sure, I did.

Q. Now, what makes you sure, and "I probably did and may be I didn't"?

A. I say I did; yes, I knew they were the same paper.

Q. Did you administer two oaths or one?

A. I don't recollect.

Q. You don't remember?

A. No, sir.

Q. Now, the place was Lakewood?

A. No, the place where these affidavits were taken was Toms River.

Q. How did you transfer your notarial functions from Lakewood to Toms River?

A. The certificate in the State of New Jersey is good anywhere in the state.

Q. Anywhere in the state?

A. Yes, sir.

Q. And a notary there acts outside of his own county?

A. Oh, yes, anywhere in the state; that is in the same county, though, both of these towns.

Q. Now, did Mr. Clutter sign both of these affidavits in your presence?

A. He did. On the big desk right in the front of the office. I distinctly remember.

Q. Of his signing both?

A. I do.

Q. Now, isn't it possible that he might have signed there (indicating)?

A. No, sir.

Q. Do you know whose handwriting that is in one of these copies, the date at the end?

A. No, sir, I don't know in whose handwriting the date is but I know that is my signature at the bottom.

Q. Did you or did you not know Mr. Downie's handwriting?

A. No, I don't.

Mr. Zane: That is all.

EXHIBIT "F"

This cause having come on before this Court and being submitted on the Order of the United States Circuit Court of Appeals dated October 15, 1931, and the cause having been reopened to consider additional evidence relating to the validity of the Downie patent No. 1,511,114, and upon the question of alleged suppression of evidence and its effect upon the decree heretofore entered in this Court sustaining all of the patents involved in the case, and this Court having heard and considered all of the evidence offered by the respective parties upon this subject consisting of the testimony given in open Court by the following witnesses:

Bernard R. Clutter
Horace B. Fay
Henry C. Beckwith
Velcair C. Smith
Charles P. Smith
Frank Oliver
Robert Rex Downie
John L. Burdge

and having considered carefully the depositions of

Bernard R. Clutter (dated Feb. 24, 1930)
Herbert Wallower
Phil Culbertson
John Cummings
M. A. Elsner
Lysle Hazen
Howard Elmire
Frederick W. Ransom

stipulated from the Toledo cases, Keystone Driller Company v. The General Excavator Company, Equity No. 964, and Keystone Driller Company v. The Osgood Company, Equity No. 965, having heard counsel and considered briefs filed by the respective parties and having handed down its opinion dated March 24, 1932 upon this subject, it is hereby ordered, adjudged and decreed as follows:

(1) That Letters Patent of the United States to Robert Rex Downie, No. 1,511,114, dated October

7, 1924, for Excavating Machine, is good and valid in law as to all of the claims thereof; that the inventor, Robert Rex Downie, named in said patent, was the first true and original inventor of the inventions, improvements and combinations described in said patent and in said claims;

(2) Neither the said Robert Rex Downie nor the Plaintiff, Keystone Driller Company, has suppressed evidence materially affecting the Defendants' rights prior to the first trial in this case upon the question of whether or not the said Robert Rex Downie was the first, true and original inventor of the inventions, improvements and combinations of said patent.

And the said Defendants except to each of said findings separately and to each and every part thereof.

And it is further ordered that the said evidence so taken, and the written opinion heretofore rendered by the Court, and the findings and journal entry in this case above recited be returned by the Clerk of this Court to the United States Circuit Court of Appeals of the Sixth Circuit in accordance with the order of said Court of Appeals.

JONES,
United States District Judge.

Approved as to form
FAY, OBERLIN & FAY,
Counsel for Defendants.

NOTICE AND PROOF OF SERVICE OF MOTION TO VACATE SUPERSEDEAS

(Filed April 13, 1932)

Corbett & Mahoney,
820 Huntington Bank Bldg.
Columbus, Ohio

Mr. Edward L. Reed
Riebold Building
Dayton, Ohio

Please take notice that on April 18, 1932 or as soon thereafter as counsel may be heard we will submit to the United States Circuit Court of Appeals for the Sixth Circuit the Keystone Driller Company's Motion to Vacate the Supersedeas in the above cases, together with Exhibits A to F inclusive, copies of which Motion and Exhibits were mailed to you Saturday, April 9, 1932.

RICHEY & WATTS,
Counsel for Keystone Driller Co.

AFFIDAVIT OF SERVICE

STATE OF OHIO, }
COUNTY OF CUYAHOGA } ss.

H. F. McNenny, being duly sworn, deposes and says that he is associated with Richey & Watts, counsel for the Keystone Driller Company; that a copy of the foregoing Notice was this day mailed by him to each of:

Messrs. Corbett & Mahoney
820 Huntington Bank Building
Columbus, Ohio

and

Mr. Edward L. Reed
Riebold Building
Dayton, Ohio;

and that a copy of the Motion to Vacate the Supersedeas referred to in said Notice and of Exhibits A to F inclusive referred to therein was mailed by him to each of Messrs. Corbett & Mahoney and Edward L. Reed at the above addresses on April 9, 1932.

H. F. McNENNY.

Sworn to and subscribed to in my presence this 12th day of April, 1932.

MADGE E. CONTANT,
Notary Public.

My commission expires March 3, 1933.

(NOTARY SEAL)

DEFENDANT'S OPPOSITION TO MOTION

(Filed April 20, 1932)

Now come the General Excavator Company and The Osgood Company, defendants below, by their attorneys and move this Court that Keystone Driller Company's Motions to "Vacate Supersedeas" and to "Proceed with the Accounting" be denied upon the following grounds:

1. That the trial court in the exercise of its sound discretion found at the time of allowing of the appeals herein, that defendants were entitled to supersedeas suspending the injunction and accounting herein pending these appeals.

2. That there has not been since the granting of the orders allowing supersedeas in these cases, any change in the situation of the parties, or of the facts relating to these suits which would warrant the vacation of the orders of supersedeas previously granted herein.

3. That the plaintiff will suffer no injury by the continuance of supersedeas pending these appeals because the trial court on refusing to grant preliminary injunctions herein against these defendants, had required them to file large bonds to cover any profits or damages that might accrue by reason of any alleged infringement up to and including the time of the entry of the decree herein. In addition to these bonds and as a condition for the granting of the orders of supersedeas the trial court required each defendant to file an additional bond to protect the plaintiff for any damages or profits that might accrue during the pendency of these appeals.

The action of the trial court was in accordance with the practice laid down by this court in the case of *Vacuum Oil Company* v. *Grabler Manufacturing Company*, 53 Fed. (2) 975.

On the other hand, the defendants would be irreparably injured if the orders of supersedeas were vacated and this court later found that the patents were invalid or not infringed, or if this court held that plaintiff was not entitled to any relief herein because of its unclean hands.

4. That the depositions and papers attached to plaintiff's Motion to Vacate Supersedeas herein, and

upon which it bases its motion, were offered in another case, before a different court against different defendants than those at bar, and that such evidence is therefore not competent in these cases against these defendants for any purpose.

5. That even if the depositions and papers offered in support of plaintiff's motion were competent in these cases, all of the evidence adduced at the rehearing before Judge Jones originated in the cases at bar and all said evidence was before Judge Hahn when he rendered his decisions and allowed supersedeas herein, except for the testimony of two or three witnesses. As to these additional witnesses, their connection with these cases was known and referred to in the trial of the cases at bar before Judge Hahn at Toledo, and he held that the failure of plaintiff to produce them, when they were available, operated strongly against plaintiff's case.

In addition to this, the testimony of these additional witnesses before Judge Jones at Cleveland did not, in any material respect either change the effect or bring in any new or additional facts that were not before Judge Hahn in the cases at bar, or bring about any change in the situation of the parties to this suit since the appeal was taken and supersedeas allowed.

6. That the affidavit of Robert Rex Downie on which plaintiff also bases this motion, is except for the last paragraph or so, part of the same affidavit almost word for word that was offered by plaintiff in these cases on plaintiff's motion for preliminary injunction. (See affidavit of Robert Rex Downie, R. V. I, pp. 21 and 22 and pp. 109 and 110.) The same facts are contained in this affidavit that were before the court when it refused to grant a preliminary injunction, and which were also before the court below when it granted the plaintiff an order of supersedeas pending these appeals.

In addition to this, it is apparent from both the decisions of Judge Jones and Judge Hahn that Robert Rex Downie has been guilty of inexcusable and highly reprehensible conduct in an effort to suppress and keep from this court and the court below, evidence bearing upon the invalidity of Downie patent 1,511,114 in suit. The affidavit of Downie, therefore, cannot be relied upon.

7. That the defendants are not responsible for any delay in the prosecution of these suits, because they have

promptly presented their defenses, and have at all times cooperated with the Court and opposing counsel to bring these cases quickly to a final issue.

8. That in addition to the fact that these motions should be denied upon their merits for the reasons given above, they should also be denied because to grant them would be to violate the orderly rules which have been established in the Federal Courts for the proper procedure on appeal. For instance, both motions request that the questions involved be sent back to the trial court for reconsideration, whereas it is well established that after appeal to this court the trial court has no further jurisdiction of these questions until the appeal is decided.

After having brought its "Motion to Vacate Supersedeas", herein the bringing of the second "Motion to Proceed with Accounting" was unnecessary and superfluous and probably was brought merely to harass defendants because upon vacation of supersedeas the right to proceed with accounting would automatically follow.

For the above reasons, it is therefore respectfully submitted,

1. That the motions of the plaintiff herein should be denied.

2. That the costs of these motions should be assessed against the plaintiff.

3. That the testimony and other papers submitted with these motions, and attempted to be improperly brought into this record, be stricken from the files.

Respectfully submitted,

CORBETT & MAHONEY,
Attorneys for Defendants, The General Excavator Company and The Osgood Company.

April 19, 1932.

ORDER DENYING MOTION TO VACATE SUPERSEDEAS

(Filed May 13, 1932)

This cause came on to be heard on motion of Keystone Driller Company, appellee, to vacate the orders entered by the District Court on July 29, 1931, granting supersedeas and suspending the injunction, and to instruct the District Court to issue injunctions as provided in paragraph 5 of the respective interlocutory decrees, or in the alternative to give permission to appellee to present this motion to the District Court and authorize it to reconsider the question of supersedeas and of issuing injunctions; and it appearing that appellants have in compliance with the orders of the District Court executed appeal bonds to operate as a supersedeas and that in the opinion of the court there has been no such change in the situation since the entry of the decrees appealed from as to reasonably require the granting of said motion,

It Is Therefore Denied.

(Signed) Xen Hicks,
Circuit Judge.

CAUSES ARGUED AND SUBMITTED

(October 4, 1932—Before: Hicks, Hickenlooper and Simons, JJ.)

These causes are argued by F. O. Richey and C. R. May for Keystone Driller Company and by E. P. Corbett and L. T. Williams for General Excavator Company and The Osgood Company and are submitted to the Court.

DECREE No. 6065

(Filed December 6, 1932)

APPEAL from the District Court of the United States for the Northern District of Ohio

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby reversed and the cause remanded with instructions to dismiss bill of complaint without prejudice. Costs are taxed against the Keystone Driller Company.

DECREE No. 6066

(Filed December 6, 1932)

APPEAL from the District Court of the United States for the Northern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby reversed and the cause remanded with instructions to dismiss bill of complaint without prejudice. Costs are taxed against the Keystone Driller Company.

DECREE No. 6067

(Filed December 6, 1932)

APPEAL from the District Court of the United States for the Northern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby reversed and the cause remanded with instructions to dismiss bill of complaint without prejudice. Costs are taxed against the Keystone Driller Company.

DECREE No. 6068

(Filed December 6, 1932)

APPEAL from the District Court of the United States for the Northern District of Ohio.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Ohio, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby reversed and the cause remanded with instructions to dismiss bill of complaint without prejudice. Costs are taxed against the Keystone Driller Company.

OPINION

(Filed December 6, 1932)

Before Hicks, Hickenlooper and Simons, Circuit Judges.

Hickenlooper, Circuit Judge: The above-numbered appeals and cross-appeals are founded upon two almost identical actions commenced in the District Court for the Northern District of Ohio, respectively against the General Excavator Company and the Osgood Company, and alleging infringement of five separate patents owned by the Keystone Driller Company, one of which was patent to Robert Rex Downie, No. 1,511,114, granted October 7, 1924, which was held valid by this court November 5, 1930. *Byers Mach. Co.* v. *Keystone Driller Co.*, 44 F. (2d) 283.

The bills of complaint in the present actions were filed after the decision of the Byers case in the District Court and while the appeal in that case was pending here, but the Downie and Clutter patents which had been upheld by the District Court were treated by plaintiff as adjudicated patents and motions for interlocutory injunctions were forthwith made and pressed. These motions were denied, but in lieu of granting them the defendants were required to give bonds conditioned upon the payment of all profits and damages which might be decreed against them, and such bonds were in fact given. In this respect and to this extent the decision of the District Court in the Byers case became an important factor in the prosecution of the present actions. Later, when this court affirmed the decree of the District Court, the effect of the Byers case became even more apparent.

We come, then, to the issue which, in our opinion, is decisive of the present appeals. Prior to the grant of the Downie patent No. 1,511,114, indeed, prior to the application for that patent, Downie heard of a possible prior use at Joplin, Mo., during the winter of 1919-1920, by one Bernard R. Clutter, a brother of the patentee of the Clutter patent in suit. Downie himself testified that his own conception of the device of his patent was in the summer of 1920; so that the information which he had received at least cast serious doubt upon the validity of any patent which might subsequently be issued to him, whether the prior use were ultimately to be con-

sidered as an abandoned experiment or not (and he was advised by his counsel that it might be so considered), and whether or not he might be granted priority in any interference declared by the Patent Office, under the doctrine of *Mason v. Hepburn*, 13 App. D. C. 86; Cf. *Westinghouse Elec. & Mfg. Co. v. Wadsworth Elec. Mfg. Co.*, 51 F. (2d) 447 (C. C. A. 6). Notwithstanding this information, and without thorough investigation of the facts, Downie proceeded to file his application for patent and the same was prosecuted to issue on October 7, 1924.

The Downie patent having issued and the action against the Byers Machine Company being in contemplation, doubt and uneasiness as to the effect of the Joplin use was revived. Counsel advised further investigation, and early in 1925 Downie went to Lakewood, N. J., to interview Bernard R. Clutter. It can not be disputed upon any reasonable construction of the evidence here that as a result of this interview Clutter was offered a merchandise credit of approximately $3800, perhaps $4000, being one-half of the cost of a Keystone excavator to be purchased by him, of which credit fifty per cent was to be enjoyed forthwith, and the other half was to be given if within two years any of the claims of patent No. 1,511,114 were held to be valid by a District Court. Clutter signed an affidavit prepared by Downie to the effect that the Joplin use was an abandoned experiment and agreed to assign to the Keystone Driller Company any rights which he might have as inventor or co-inventor of the device covered by the patent; but it is quite obvious that the credit which had been agreed upon was given to Clutter upon the implied condition that he should keep secret the details and circumstances of that prior use—that so far as he was able to produce this result the evidence which caused the patentee uneasiness was to be suppressed.

The full amount of the initial credit was not given immediately, but in January, 1927, we find the Keystone Driller Company cancelling four of Clutter's notes amounting in all to $1700 exclusive of interest. Eighteen months thereafter Clutter became financially unable to perform further the terms of his agreement for the purchase of this and another excavator. He was in default upon his notes and the company was threatening repossession proceedings. Bankruptcy threatened. The District Court had not yet decided the Byers case, so that

the second installment of credit was not yet due; but it would seem that the parties considered the continued silence of Clutter as essential, for in November, 1928, Downie agreed to pay in cash one-half of the second installment of the promised credit, inasmuch as the excavators were being repossessed. One-half of the promised amount of cash was paid by check November 15, 1928, but again, "the other half of the contingent cash credit was not to become payable until and unless our case [the Byers action] should be satisfactorily decided by the end of 1928." The decree in the Byers case was finally entered January 31, 1929, and it was not until about that time that the payment of any further consideration to Clutter was definitely refused.

The District Court after an exhaustive consideration of the evidence, a more detailed consideration than can here be given, characterized this conduct of the patentee as "highly reprehensible," but refused to apply the maxim that one who comes into equity must come with clean hands because during the course of the taking of testimony all of the above-recited facts ultimately came to light, and therefore, it was said, "there was in no sense a suppression of any evidence in these cases." In the first conclusion of the District Court we thoroughly concur; to the second we can not agree. Obviously, that which subsequently developed could have no effect upon the nature or quality of the plaintiff's antecedent conduct, or upon the right of the plaintiff to seek the aid of a court of equity as of the date of the filing of the bill of complaint. Pomeroy defines the meaning of the maxim as follows: "It says that whenever a party, who, as *actor*, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him *in limine*." Equity Jurisprudence (4th Ed.), § 397. Doubtless a party may be guilty of such unconscionable conduct during the progress of litigation that a court of equity will refuse him further relief, but in respect of antecedent action it is as of the date of the filing of the bill of complaint that his conduct must be appraised. To hold otherwise would be to insure the malefactor against the injurious effects of his misconduct; if the facts were brought to light, there would be no suppression; if such facts were never disclosed, the fruit of the misdeed would

be fully enjoyed. Such can not be the law. Cf. *MacRae* v. *MacRae*, 37 Ariz. 307, 319; *Carrington* v. *Pratt*, 18 How. 63, 67.

The maxim is of so ancient an origin that extended analysis of its scope and effect would seem unnecessary. The doctrine is well stated in *Deweese* v. *Reinhard*, 165 U. S. 386, 390: "A court of equity acts only when and as conscience commands, and if the conduct of the plaintiff be offensive to the dictates of natural justice then, whatever may be the rights he possesses and whatever use he may make of them in a court of law, he will be held remediless in a court of equity." Again, in *Manhattan Medicine Co.* v. *Wood*, 108 U. S. 218, 227, the court adopts the language of the opinion in *Fetridge* v. *Wells*, 4 Abbott (N. Y.) 144, that: "Those who come into a court of equity seeking equity, must come with pure hands and a pure conscience." See also, *Weegham* v. *Killefer*, 215 Fed. 168, aff'd 215 Fed. 289 (C. C. A. 6), and cases there cited. "Any really unconscientious conduct, connected with the controversy to which he is a party, will repel him from the forum whose very foundation is good conscience." Pomeroy's Equity Jurisprudence (4th Ed.), § 404.

This last quotation suggests the principal contention of the plaintiff. It is urged that even if the plaintiff wrongfully suppressed evidence, the effect of such suppression was exhausted with the decision of the Byers case, and thereafter the opportunities to secure such evidence and the relationship of the parties were the same as if no such acts had been performed. Hence, it is said, the wrongful acts, if any, were wholly disconnected with the present controversies and without that direct relation to them which is necessary to constitute a bar. It must be conceded that a court of equity "is not an avenger of wrongs committed at large by those who resort to it for relief" (*Kinner* v. *Lake Shore & M. S. Ry. Co.*, 69 Ohio St. 339), and that the wrongful conduct must be in regard to, or at least directly connected with, the matter in litigation. *Bentley* v. *Tibbals*, 223 Fed. 247 (C. C. A. 2); *Cropper* v. *Davis*, 243 Fed. 310 (C. C. A. 8); Pomeroy's Equity Jurisprudence (4th Ed.), § 399. But the necessary connection is not here missing. As long as it was thought desirable, in order to secure an adjudication upon the patent, the hope of reward for silence was held before Clutter. This was the act of the plaintiff

as much as of Downie, its officer and moving spirit. The only possible effect of such conduct was to suppress Clutter's testimony, or, if the facts came to the knowledge of the defendant, to make him an adverse or unwilling witness. When the adjudication had been obtained, the plaintiff brought the present actions seeking by motion for an interlocutory injunction to avail itself of the advantages so obtained. Perhaps the necessary connection would have been lacking had the plaintiff elected to treat the patent as unadjudicated, or had based its action only upon the other patents in suit. This we need not decide. It is enough that neither of these courses was pursued; and that the wrongful conduct was in regard to and directly connected with one of the matters in litigation, the patent, not simply as a patent, but as an adjudicated one.

The next insistence of the plaintiff is that the alleged misconduct should not be held to constitute a bar since it related to an immaterial matter, the Joplin use being in truth and in fact but an abandoned experiment. At the very least, it is urged, anticipation is not proved with that degree of certainty which is required by the doctrine of *The Barbed Wire Patent*, 143 U. S. 275, 284, and the cases which have followed it. This seems to us to be immaterial. We are not here and now concerned with a question of anticipation, but of conduct, and certain it is that there was enough in the information communicated to Downie to cause uncertainty and anxiety to him and to the plaintiff, and to bring about the action finally taken. If the conduct was reprehensible, it matters not that it was really unnecessary.

The plaintiff also contends that neither in the Byers case nor in the present cases was there any obligation upon it to make disclosure of those possible prior uses which might affect the validity of the patents which it owned. This is true; but there was an obligation, in all righteousness and good conscience, not to do that which was done—not to build up a defense against the supposed prior use by buying an affidavit phrased as plaintiff wished it to be phrased, and possibly not in strict accord with the facts, by purchasing Clutter's silence, or at least making him an adverse witness for others, and by continuing the effectiveness of this course of action by making future gain contingent upon a favorable result of the pending action until the very advantage

which it was intended should be obtained was at last secured.

Under the above-stated principles we are of the opinion that the plaintiff should have been denied relief in a court of equity. The decrees of the District Court are reversed and the causes are remanded with instructions to dismiss the bills of complaint without prejudice to the prosecution of suits at law, or, indeed, to subsequent actions in equity upon the other patents in suit. Possibly the plaintiff may now have the right to commence anew an action in equity upon all the patents, including patent No. 1,511,414. Upon this we express no opinion. Costs are taxed against the Keystone Driller Company in each of the four appeals now decided.

PETITION FOR REHEARING

Filed January 5, 1933

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United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT.

GENERAL EXCAVATOR COMPANY, *Appellant*, vs. KEYSTONE DRILLER COMPANY, *Appellee*,	No. 6065.
KEYSTONE DRILLER COMPANY, *Cross-Appellant*, vs. GENERAL EXCAVATOR COMPANY, *Cross-Appellee*.	No. 6066.
THE OSGOOD COMPANY, *Appellant*, vs. KEYSTONE DRILLER COMPANY, *Appellee*.	No. 6067.
KEYSTONE DRILLER COMPANY, *Cross-Appellant*, vs. THE OSGOOD COMPANY, *Cross-Appellee*.	No. 6068.

PETITION FOR REHEARING.

To the United States Circuit Court of Appeals for the Sixth Circuit and the Honorable Judges thereof:

Comes now Keystone Driller Company, Appellee and Cross-appellant in the above-entitled causes, and

presents this, its Petition for a Rehearing of the above-entitled causes, and in support thereof respectfully shows:

I.

The Bills of Complaint ought not to be dismissed as to:

(a) The two patents in suit, Nos. 1,709,466 and 1,716,432 which were not in the *Byers* case;

(b) The two patents, Nos. 1,317,431 and 1,543,250 which were in the *Byers* case other than the Downie patent No. 1,511,114 to which last-mentioned patent alone the "unclean hands" doctrine was held to apply;

for the reasons that each patent in suit is a separate and distinct grant and the basis of a separate and distinct cause of action from each of the other patents in suit, that the several patents in suit were joined in said Bills of Complaint under the authority of General Equity Rule No. 26, and for the convenience of the Court and the parties, and the conduct of Downie held to be cause for denying relief as to Patent No. 1,511,114 is not connected, and not held to be connected in any way with any of the other four separate patents in suit or the causes of action thereon.

II.

It appears conclusively from the present record that the Clutter affidavit recorded and preserved the truth alone (except for one mistake which is against the Plaintiff), and from the opinion rendered on the rehearing of the *Byers* case by His Honor Judge Jones, the only judge who has seen and heard Clutter in any stage of any of

the litigation here involved, that Judge Jones has found Clutter wholly unworthy of credence as a witness. We respectfully submit that binding such a witness to the truth, as the affidavit did, in advance of litigation is not reprehensible conduct.

III.

In applying the "unclean hands" maxim to patent litigation, it is respectfully submitted that there ought to be weighed and considered customs peculiar to patent practice, long recognized and regularly observed therein and necessitated by conditions peculiar to that practice, —such conditions including the extreme and apparently unavoidable delays encountered in prosecuting litigation on patents, the decreasing weight of the presumption of validity of a patent arising from its grant by the Patent Office, and the limitless number and variety of devices that can be and frequently are relied upon by a defendant in a patent suit.

IV.

It ought not to be considered improper to rely upon the formal decree of a court of competent jurisdiction, wher the matters alleged to have tainted that decree have been presented to and considered by that Court in a rehearing had solely for the re-examination of such matters, and that Court has, upon such rehearing, reaffirmed its original decree.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for a Rehearing be granted, that times be set for the filing of briefs upon these questions and for oral argument, and that the decree

of the District Court be, upon further consideration of such briefs, argument and record, affirmed in cases Nos. 6065 and 6067, and reversed in cases Nos. 6066 and 6068.

Respectfully submitted,

W. H. Boyd,
F. O. Richey,
H. F. McNenny,
Of Counsel for Petitioner.

Boyd, Brooks & Wickham,
Richey & Watts,
Solicitors for Petitioner.

CERTIFICATE OF COUNSEL.

To the United States Circuit Court of Appeals for the Sixth Circuit, and the Honorable Judges thereof:

We and each of us hereby certify that we are counsel for Keystone Driller Company, Appellee and Cross Appellant in the above entitled causes, that we prepared the foregoing petition of said company for rehearing, that we are informed as to the proceedings in said causes, that said petition for rehearing is made in good faith, and not for the purpose of delay or hindrance of said proceedings, and that in our judgment said petition for rehearing is well founded.

W. H. Boyd,
F. O. Richey,
H. F. McNenny,
Of Counsel for Petitioner.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING.

We respectfully urge that the foregoing petition for rehearing be granted for the reason that the points presented therein were not fully presented or considered by the Court on the hearing of these cases. We believe that these points are material and controlling and that a consideration of the same in connection with the authorities and argument will impel the Court to reach conclusions contrary to those expressed in the decision of December 6, 1932 in the above causes.

The specific reasons why we believe each of the foregoing grounds should be considered by the Court upon rehearing, the authorities in support thereof, and the reasons we regard these grounds as material and controlling are as follows:

I.

The Maxim that He who comes Into Equity must come with Clean Hands is limited to the Particular Subject Matter to which the Inequity Attaches.

This question has not been presented to the Court before this petition; it did not logically arise until after the decision. The defense of "unclean hands" does not appear in the original or amended pleadings. In their main brief before this Court Defendants Appellants said, (page 162) "The inequitable and fraudulent conduct of the Plaintiff here complained of grew out of and is inseparably connected with the rights which the Plaintiff is attempting to have the courts enforce with respect to *this* patent (Downie No. 1,511,114) in these suits." From this statement it is logical to conclude that our adversaries considered, as we do, that the alleged inequity,

and relief sought as a result thereof, was limited to the one patent. (Emphasis ours throughout unless otherwise indicated.)

Authorities:

In re Myerfield, 46 Fed. (2) 665; (D. C. N. D. Cal.) (Affirmed *Williams vs. Levy*, C. C. A. 9, 54 Fed. (2), 18);

Maatschappij vs. Kosloff, 45 Fed. (2) 94 (C. C. A. 2);

Barnes vs. Barnes, 282 Ill, 593;

21 *Corpus Juris*, §173, page 188, note 62;

Munn vs. The Americana Co., L. R. A. 1916, D-116; 83 N. J. Eq. 309; 91 Atl. 87;

Harris vs. Harris, 208 Ala. 20, 93 So. 841.

In re Myerfield (supra) one Levy sought to prevent sale by a referee in bankruptcy of property held by the bankrupt, Myerfield. Levy offered in evidence a deed conveying the property to him, and also introduced evidence establishing a resulting trust as to the same identical property in his favor. The referee found the deed to be a forgery, and denied all relief to Levy, in spite of the proof of a resulting trust, on the ground that Levy had come into court with unclean hands by reason of his offer of the forged deed, and was not entitled to invoke the equitable jurisdiction of the court either as to the deed or the resulting trust. The District Court reversed the order and found Levy was entitled to relief as to the resulting trust since the inequity applied only to the deed. The Court said, page 666:

> "Reprehensible though Levy's conduct may have been, I am constrained to hold that the referee erred in denying him all relief because he came into equity with unclean hands. The transaction by which the

resulting trust was created was not tainted with fraud, illegality, or unconscionable conduct on his part. The deed in question was not part of the proof of the existence of the trust; it was material only on an issue of legal as distinguished from equitable title. The applicable principle is well stated in *Barnes vs. Barnes*, 282 Ill. 593, 118 N. E. 1004, 1005, 4 A. L. R. 4, where a plaintiff had fabricated evidence to support various items in an account, but had established her right generally to an accounting in equity: '*He who comes into a court of equity must come with clean hands, and one who does iniquity cannot have equity; but that maxim is limited in its application to where the substance of the thing is inequitable and the iniquity must apply to the particular subject-matter.* It is not sufficient to bar relief that inequitable conduct should relate to the proof of some item or some fact, and where the origin of the claim is not inequitable, a fraudulent act in relation to it will not bar relief. *Goodwin vs. Hunt*, 3 Yerg (Tenn.) 124; 1 *Pomeroy's Eq. Jr.*, Section 399; *Chicago vs. Union Stockyards & Transit Co.*, 164 Ill. 224, 35 L. R. A. 281, 45 N. E. 430, 10 R. C. L. 140.' ''

This decision was affirmed by the Circuit Court of Appeals for the Ninth Circuit in *Williams vs. Levy*, 54 Fed. (2) 18.

The same rule was stated by the Second Circuit Court of Appeals in *Maatschappij etc. vs. Kosloff*, 45 Fed. (2) 94, as follows (page 96).

"Irrespective, however, of the validity of the trade-mark, we concur in the holding of the trial judge that, even if the claim, asserted by the registration, of a ten-year use of the mark prior to 1905, means such use in this country and if such claim were false, so that plaintiff would be unable to assert rights under the trade-mark, it would not there-

by be prevented from obtaining relief against unfair competition in the sale of its goods; *wrongdoing directly connected with the right sought to be vindicated may on the doctrine of 'unclean hands' deprive one of a remedy against piratical attacks on that property right; it does not outlaw the wrongdoer and leave him without protection in the vindication of other; though closely connected rights. Straus vs. Notaseme Co.*, 240 U. S. 179, 36 S. Ct. 288, 60 L. Ed. 590."

The case of *Barnes vs. Barnes*, 282 Ill. 593, cited and relied on by the Court in *In re Myerfield*, is a leading case on this point, and is cited in 21 *Corpus Juris*, Sec. 173, p. 188, n. 62, as authority for the statement:

> "Inequitable conduct in regard to the proof of some item or fact in a transaction does not preclude plaintiff from recovering the relief sought as to other items."

In the case of *Munn and Company vs. The Americana Co.*, 83 N. J. Eq. 309, 91 Atl. 87, the Vice-chancellor found facts establishing an agreement on the part of the complainant and the Americana Company to make money out of the public by publishing an encyclopedia by a corporation organized under the name of "Scientific American Compiling Department" and representing the encyclopedia as the work of the "Scientific American," a publication owned by the complainant, and thereby availing themselves of the reputation of that journal to attract subscribers for the encylopedia. Later the complainant sued to enjoin the use of the name "Scientific American Compiling Department" and also the use of the name "Scientific American" apart from the full corporate name. The Vice-chancellor awarded an injunction on both grounds. On appeal to the Court of Errors and Appeals, the case was heard by ten judges, nine of whom

concurred in reversing the Vice-chancellor as to the use of the corporate name "Scientific American Compiling Department" on the ground that complainant was not in court with clean hands, *while allowing the injunction to stand against the use of the name "Scientific American" in other ways.* The tenth judge dissented on the ground that the Vice-chancellor's decree should be affirmed in its entirety. Judge Swayse who delivered the opinion of the Court said (page 118):

> "We think that the complainant, when it tires of its bargain and seeks to enjoin the defendant from further profiting by the supposed connection, does not come into court with clean hands."
>
> *"We think therefore that the decree must be reversed; but it does not follow that the complainant is not entitled to some of the relief granted. The disqualification applies only to the particular matter or transaction with which the wrongful conduct had to do. Wodward vs. Woodward,* 41 N. J. Eq. 224, 4 Atl. 424. In this case the complainant's wrongful act had to do with the exploiting of the encyclopedia under the name of 'Scientific American Compiling Department.' The complainant is not shown to have assented to the use of the name 'Scientific American' for any other purpose. So far as the decree enjoins the Scientific American Compiling Department from using its corporate name it must be reversed; so far as it enjoins the use of the name 'Scientific American' in other ways, it must be affirmed."

The case of *Woodward vs. Woodward,* 41 N. J. Eq. 224; 4 Atl. 424, cited by Judge Swayse in *Munn vs. Americana Company, supra,* was a divorce action brought by the husband on the ground of adultery. Two adulterous acts were charged in the complaint; one committed by a man by the name of Carr on the 16th of March,

1885, and the other with the complainant's brother on the 6th of January, 1886. The Vice-chancellor stated that the proofs which established the illicit sexual intercourse with the complainant's brother demonstrated with almost equal clearness that the complainant had procured her to be debauched. The complainant thereupon abandoned the second adulterous act on the argument and the defendant urged that the complainant should be denied relief because he came into court with unclean hands. Van Fleet, Vice Chancellor, stated:

> "Were the case one in which it would be proper to apply the maxim 'That he that hath committed iniquity shall not have equity' or as it is sometimes rendered 'That he who comes into equity must come with clean hands' the court must thrust the petitioner from its doors promptly and sternly. But this maxim cannot be applied to the petitioner, if it be true that the defendant committed adultery on the 16th of March, 1885. If she was guilty of adultery on that day her crime was purely the result of her own depraved nature. There is nothing in the evidence which will justify even a suspicion that up to that time a desire had found a place in petitioner's heart that his wife might go astray. If, therefore, she did commit adultery on that day, her crime constituted a ground for divorce. Her criminal act gave her husband a right of action against her, of which nothing short of his voluntary surrender, or the commission by him of a matrimonial offence which entitled her to a divorce, could deprive him. The iniquity which deprives a suitor of a right to justice in a court of equity is not general iniquitous conduct, unconnected with the act of the defendant which the complaining party states as his ground or cause of action but must be evil practice or wrongful conduct in a particular matter or transaction in respect to which judicial protection or redress is sought. 1 *Pom. Eq. Jur.*, Sec. 399."

In the case of *Harris vs. Harris*, 93 So. 841, 208 Ala. 20, Judge Sayre quoted and relied upon the following statement of the law from *Clemens vs. Clemens*, 28 Wis. 637, 652; 9 Am. Rep. 520, 530:

> "Though engaged in an illegal transaction—hardly so much can be said against the conduct of complainant in this case—and unable to assert or maintain any rights or remedies founded on the unlawful thing done or intended to be done, *still the plaintiff forfeited no right or privilege beyond that, or with respect to any other matter or thing not within the purpose of the wrongful act, and not affected by the corrupt intent or caused or produced in consequence of it.* To the extent of his intended wrong he might be without a remedy, but in all other respects his rights and remedies are the same as if no such wrong had been done or intended. This is and should be the true measure and extent of all just punishment. *Though guilty of a wrong or transgression of the law in one particular*, a party does not become an outlaw, or forfeit his right to legal protection in all others, *nor lay himself open to the frauds and machinations of others to be practiced and perpetrated against him with impunity.*"

The Facts: (a) The patents in suit, No. 1,709,466, April 16, 1929 and No. 1,716,432, June 11, 1929 were not in the *Byers* case. Both were issued after the entry of the decree in the District Court in the *Byers* case. Both were issued after the applications for injunctions were submitted to Judge Hahn in the instant cases. Judge Hahn's opinion on the preliminary injunction proceedings was dated April 25, 1929, before the issue of patent No. 1,716,432, and his order on the preliminary injunctions was entered June 12, 1929, the day after the issue of patent No. 1,716,432.

The Plaintiff did not rely, or seek to rely, upon the adjudication in the *Byers* case in urging the validity and infringement, or anything else, regarding the patents Nos. 1,709,466 and 1,716,432. No request was made that interlocutory injunctions be issued upon these patents. These two patents were unadjudicated and were so treated, and were added to these causes by Supplemental Bills filed August 9, 1929, after the termination of the interlocutory injunction proceedings.

(b) The patents in suit Nos. 1,317,431 and 1,543,250 were in the *Byers* case and the adjudication of these patents in that case was relied upon in the instant cases throughout; but unlike the resulting trust in the *Myerfield* case and the unfair competition cause in the Second Circuit case, these two patents related to different items or causes. The Downie patent No. 1,511,114 to which the wrong-doing is held to attach covers sub-combinations separable from the other inventions of the other patents and is usable with or without them.

Argument: In the cases at bar each of the patents is included in these suits under the provisions of General Equity Rule 26 to the effect that Plaintiff may join in one bill all of the causes of action cognizable in equity that he may have against a defendant. Not only is each of the patents in suit a separate item, but it is, in fact, a separate cause of action joined under this rule. If separate causes had been brought under the separate patents, the wrong-doing would not have attached to these separate causes and the conclusion of this Court's opinion in this matter indicates that this Court so thinks. It is not reasonable to suppose that the Supreme Court in promulgating General Equity Rule 26 contemplated doing anything more than promoting the convenience of

the Court and the parties. It would be unreasonable to suppose that the Court intended that a tainted cause joined under this rule would taint other causes which, before the rule, might have been presented separately.

Infringement of each patent is a separate and distinct cause from the infringement of each other.

The four patents in suit other than the Downie patent No. 1,511,114 are usable with or without the inventions of said Downie patent. The Clutter patent No. 1,317,431 was held by this Court to cover a pioneer invention and to be generic. The machines disclosed in this patent have been made and sold in large numbers and used extensively without the improvements of the Downie patent No. 1,511,114. Patent No. 1,543,250 discloses a combination of elements for preventing the blind spot and is usable with any ditching machine combination, whether disclosed in patent No. 1,511,114 or not. Patent No. 1,709,466 is for a combination covering the means for connecting the stick to the bucket and is independent of the combinations whereby dumping is effected. It may be used whether dumping means are employed or not. Patent No. 1,716,432 broadly covers a combination employing a special side rake tooth and is independent of the combination of the Downie patent No. 1,511,114. On the other hand, in both the *Myerfield* and the Second Circuit case which we have cited, the causes or items were interlinked and inter-dependent.

The instant cases are, therefore, further without the rule than the cited cases. In the *Myerfield* case, the forged deed and the resulting trust related to the same subject-matter.

In the Second Circuit case, trade-mark infringement and unfair competition related to the same subject-mat-

ter. The rule of law in such cases applies with more force in the instant cases than in those cases. Here we have separate causes not even borne or in existence when the alleged inequity occurred.

In the *Myerfield* case there was but one cause and in the Second Circuit case the two causes were co-extensive and related to the same identical subject-matter. In the instant case the causes are separable and might be prosecuted as separate causes. There is, therefore, greater reason in the instant cases for applying the rule that the punishment for unclean hands will apply only to the item to which the alleged inequity attaches than in the cited cases.

II.

The Clutter Affidavit Recorded and Preserved the Truth. Is it Reprehensible to Preserve the Truth for the Court, Especially when the Affiant was believed to be Unreliable? We recognize and subscribe to the rule that it is reprehensible to bias the testimony of a prospective witness by proffered reward, whether such reward be contingent upon the outcome of litigation or not. That rule is not applicable to a situation where a party seeks only to have a possible witness of doubtful credibility record by affidavit the facts in a given case. The Court punishes not because of the conduct *per se*, but because of conduct that perverts the truth. In the instant case we have a dishonest man, Clutter, who has been bound to the truth. About Clutter's dishonesty Judge Jones said:

> "He testifies that Downie wrote it, but that he never read it and did not know its contents. This is effectively controverted by the notary before whom he signed and swore to it. If he swore to that affidavit his present testimony is false. His credibility,

in my opinion, has been so far impaired as to effectually destroy its weight."

Judge Jones is the only judge who has seen and heard Clutter. Plaintiff had the advantage of the courts in knowing that Clutter was dishonest long before he appeared in Court. Knowing that Clutter was dishonest and might, when the time came, testify dishonestly, as Judge Jones says he has, Plaintiff took the affidavit to bind him to the truth and the deal was made, not to make him a prejudiced witness, but to guard against his unreliability. The affidavit states the truth except where there is an error that is against the Plaintiff. The facts in the affidavit check (1) with the testimony of the other witnesses who testified about the Joplin use, (2) with the testimony of Clutter and (3) with the affidavit of Wallower.

The affidavit identifies the affiant as the Bernard R. Clutter who testified in these cases, and, as set out in the following parallel columns, recites facts which are proven by the testimony of defendants' witnesses, hostile to the Plaintiff:

Facts in Affidavit	*Proven by*
In December of 1919 or January 1920 Clutter assisted in the construction of two drop-bottom ditcher scoops.	Clutter, R. pp. 575 and 578 Wallower, R. p. 610 Cummings, R. p. 594 Hazen, R. pp. 598 and 601 Wallower affidavit, R. Vol. III, p. 183
Clutter operated the excavator on the excavation for the basement of the Joplin Supply Co. Building in Joplin, Mo. on which job the drop bottom ditcher was tried.	Clutter, R. p. 577 Phil Culbertson, R. pp. 586 and 587 Cummings, R. p. 593 W. L. Culbertson, R. p. 591 Cummings, R. p. 593 Hazen, R. p. 601 Wallower, R. p. 610 Wallower affidavit, R. Vol. III, p. 183
The device consisted of elements numbered (1) to (8) inclusive, of which elements (1) to (5) inclusive and (8), the boom, ditcher stick, sheave stands, hoisting cable, links, and hauling line	Clutter, R. p. 575 Phil Culbertson, R. p. 587. Cummings, R. p. 593 Hazen, R. p. 601 Wallower, R. pp. 610 and 611

were precisely the regular Keystone Ditcher parts as manufactured by The Keystone Driller Co. under patent No. 1,317,431.

The device included "(6) a scoop [rigidly] attached to the lower end of the stick having (7) a falling bottom pivoted to the sides of the scoop at a point near the open end of the ladder and near the lower edge of the sides."

Clutter, R. p. 576
Phil Culbertson, R. p. 588
Cummings, R. p. 594
Hazen, R. pp. 601 and 602
Wallower, R. Vol. II, p. 611
Wallower affidavit, R. Vol. III, p. 183
(The word "rigidly" is an error but is against the plaintiff. The mode of attachment testified to by Defendants' witnesses and shown in Defendants' Exhibit 26 could not be rigid; Downie, R. Vol. II, pp. 844 and 846)

"The new contrivance consisted in [rigidly] fastening a scoop body, [made after the pattern of the body of] the Keystone skimmer scoop, to the lower end of the stick, providing for discharge by the use of a pivoted bottom."

Clutter, R. Vol. I, p. 576
Phil Culbertson, R. Vol. I, p. 587
Cummings, R. Vol. I, pp. 593 and 594
Hazen, R. Vol. I, p. 601
Wallower, R. Vol. II, pp. 610 and 611
(The witnesses disagreed as to whether the scoop was "made after the pattern of the Keystone skimmer scoop" as stated in the affidavit, or was the identical skimmer scoop purchased with the machine. Clutter stated he did not remember. R. Vol. I, p. 576. Wallower stated in his affidavit, R. Vol. III, p. 183: "After securing from the Keystone Driller Company a print of the body plate of the Keystone skimmer scoop we had two scoops made for use in the manner described above."

"Two scoops were made in order that one might be always available as a stand-by to insure against the delay of the job which might have resulted from the necessity of repair or revision."

Hazen testified, R. Vol. I, p. 603: "Two scoops were rigged up for use as drop bottom scoops on this Joplin Supply Co. job because everybody that saw it from then on I think wanted to add a little additional, and as they got an idea we took the extra scoop not in use and built their idea into it." Wallower testified: R. Vol. II, p. 615: "Both excavating machines used were equipped with a skimmer scoop, which provided a spare scoop for emergency when using one machine." Wallower stated in his affidavit: "The principal reason for building two instead of one for trial was that we desired to have one scoop as a substitute for the job immediately before us, as a fallback in case of breakage." R. Vol. III, p. 183.

"Both scoops were in about the same stage of development when use as ditchers was given up. Both scoops were dismantled shortly after having been used on the Joplin Supply Co. job, and were converted into skimmer scoops."

Hasen testified, R. Vol. I, p. 602: "It's hard to answer what became of the machine after this Joplin Supply Company job was finished, particularly the scoops that had been used as drop bottom scoops, rigidly attached on the ditcher stick because there were two scoops changed. They were both of them changed back to skimmer scoops. One of them was made into a special sand scoop for skimmer work when the machine was later sold by Wallowers." Also Wallower affidavit, R. Vol. III, p. 184.

"Experimentation was abandoned;"

Clutter testified (R. Vol. I, p. 583): "Q. After you completed the excavation on the Joplin Supply Company's basement, you abandoned further experimentation on this device, did you not? A. Yes, sir, I did not go any further into the experiments at that time. • • • I did not do any more work on the drop bottom scoop after that time."

Hasen testified: "I have never seen this scoop after the job." (R. Vol. I, p. 608)

Wallower testified (R. Vol. II, p. 616): "Q. Then I take it that you did not do any further work on the scoop? A. That is true.

Q. And never saw this scoop in operation again? A. Do you mean this particular scoop or others of the same type?

Q. I mean either of the two scoops you used on the Joplin Supply Company job? A. As explained before on completion of this job the machines were stored and later sold and attachments also disposed of so that I never saw these particular scoops again."

Wallower stated in his affidavit, R. Vol. III, p. 184: "In March or April 1920 use as ditchers was abandoned and both scoops were converted into skimmers."

Extreme care was required to make the device as a whole operative, especially the latching arrangement.

Clutter testified (R. Vol. I, p. 583): "I figured on making a change on the latching arrangement." Hazen testified (R. Vol.

t, p. 603): "Everybody that saw it from then on I think wanted to add a little additional, and as they got an idea we took the extra scoop not in use and built their idea into it. I think all of these ideas related principally to the latch."

And, p. 604: "There was accidental unlatching due to the flexure of the scoop."

Wallower stated in his affidavit, R. Vol. III, p. 184: "The falling bottom was found to be of advantage in discharging sticky clay but not of sufficient advantage to warrant our continuing the use of the scoops in view of the care and repairing required for operation."

Where legal conclusions are stated in the affidavit such conclusions were affirmed by Judge Jones, the only Court passing on them thus far.*

There can be no wrong in securing the signature or affidavit of a prospective witness to a statement that contains the truth whether such prospective witness be honest or dishonest. As we understand it, the Court

---

* The affidavit states that the machine was "tried" at Joplin, that "both scoops were in about the same stage of development when use as ditchers was given up"; and that "experimentation was abandoned" because of the care required to make the device operative, and because Clutter did not conceive the advantage of the dumping bottom to be of sufficient practical worth to justify the expense of the re-design and experimentation which would have been necessary to make the device commercially useful.

Judge Jones stated:

"The changes there made (at Joplin) in the machine were not satisfactory and were not developed, in my opinion, to the point where they constituted anticipation of Downie. The drop bottom rigid scoop tried out at Joplin was not persisted in, but, on the contrary, it was abandoned * * *. I find that the Joplin machine was not satisfactory; that it was never perfected to the point of successfully accomplishing the result claimed for it; that it was an abandoned experiment."

wants the truth and acts to punish when a party militates against and not for the truth. Nor can it be said with any confidence that an affidavit which bound the dishonest Clutter to the truth made him a hostile or unwilling witness to anyone charged to infringe the patent except insofar as his testifying to the truth made him hostile or unwilling to such an infringer.

If the affidavit had any effect upon Clutter it was adverse to Plaintiff and not Defendants. The record shows and Judge Hahn held that Clutter was hostile to the Plaintiff in the instant cases. Clutter was also hostile to the Plaintiff in the *Byers* case. We did not offer the affidavit in evidence in the instant cases. The evidence as adduced by the witnesses other than Clutter was better for us than the affidavit.

As conclusive evidence of Downie's good faith, it nowhere appears in this record that Downie or the Keystone Company, of which he was the virtual head, did anything at any stage of these long proceedings to hinder or interfere with the production of Clutter as a witness, or to bias any testimony which he chose to give.

The whole matter it seems to us teeters about the truth, and the conduct of Downie is reprehensible or not, depending upon whether it promoted or interfered with the presenting of the truth to the Court.

III (a).

The Practice of Adducing Affidavits: Situations peculiar to the patent practice tempt a patentee in contemplation of litigation to bind a dishonest prospective witness to the truth in advance by procedures that may, unless carefully considered and analyzed, shock the conscience of a court of equity.

First, there is the long delay from which we do not seem to be able to free patent litigation* and from which delay it results that witnesses testify ten or fifteen years after the event, under circumstances where temptation to fabricate or torture the testimony against the patentee is impelling and too often effective as all patent courts have recognized. (*The Barbed Wire* case.) Against this practice the patentee has no means of defending himself or of avoiding seeing his patent and his investment in the litigation destroyed and lost with increasing costs against him except the chance that the Court will detect the fabrication or torturing of the evidence. This is not always a sound foundation upon which to rest such rights and such investments. Under the circumstances it should be difficult to condemn a patentee who places large investments in litigation for defending himself against the fabrication or torturing of evidence by adducing from the prospective witnesses, especially those known to him

* This litigation was started by the filing of the Bill in the *Byers* case in December, 1926. That suit came on in its regular turn to be heard in June, 1927 and the Plaintiff was then ready and eager to try it. Judge Westenhaver, however, postponed the hearing until September, 1927, to make way for and use its assignment to try a criminal case. The *Byers* case was tried in September, 1927, but while under consideration by Judge Westenhaver, he was taken sick and died. Politics, we are told, interfered with the immediate appointment of his successor and Judge Jones could not reach the case until January, 1929, when it was heard and decided by him.

Appeal was taken and heard by this Court in November, 1929, but decision was not handed down until December, 1930. Trial in the instant cases was then delayed until the spring of 1931. Decision was had in the summer of 1931. Appeal was taken and set specially by this Court for May, 1932, but on the vacating of the May, 1932 term of this Court, hearing was delayed until October, 1932. During these years Plaintiff pressed wherever expedient to do so or where pressure promised express. It is during such periods of delay that opportunity arises to fabricate or torture testimony about ancient defenses.

to be dishonest, affidavits which record the truth that the Court may have the truth and not fabricated or tortured evidence. Such investigations and the preserving of such evidence must of necessity take place before suit is instituted. The law provides a patentee with no means of preserving such evidence. The use of subpœna and like process is not available to him. He must then accede to the affiant's terms. We think it needs no charity on the part of the Court to conclude that the Plaintiff was recording and preserving the truth of the Joplin work when the Clutter and Wallower affidavits were adduced and not showing temerity about the effect of that defense. If the truth had been that that defense was fatal to the Downie patent, suit on it would never have been instituted. Certainly where there is such unavoidable delay in patent litigation as in the litigation over these patents, and where the courts recognize and state so emphatically not only the danger, but the practice of infringers employing that delay to fabricate and torture testimony, a patentee should be privileged to investigate such evidence timely to determine if he should invest in the litigation and record and preserve such evidence that it may not be tortured or fabricated against him. If the law furnishes the patentee no process by which this may be done, the law should not complain if he is driven to the affiant's bargain to record and preserve the truth for the Court. We agreed that it would be reprehensible even in these exigencies to record and preserve an untruth. Nor should it matter whose phrases are used if those phrases record and preserve the truth. The Courts are not to be misled by the phrases employed or by the words that record the truth, so long as it is the truth that is recorded. As we say, the whole matter hinges and gravitates about whether the affidavit records the truth or the untruth.

III (b).

The Practice of Making Payments for Patent Rights Contingent Upon the Court's Decisions: Payments contingent upon the outcome of litigation are the basis of virtually all present day patent contracts that would make the patentee and his associates biased and hostile if this holding of the court were the law. The installment plans of payments in which payments are contingent upon the outcome of the litigation as agreed to in Defendants' Exhibit No. 98 (R. Vol. IV, p. 1298) are peculiar to transactions regarding patent rights, and have become common of recent years in such transactions due to the uncertainty of the outcome of litigation on patents. When the presumption of the validity of a patent arising from its grant by the Patent Office was a reliable presumption purchasers of patent rights were willing to make deals regarding them not contingent upon their adjudication by the Courts, but under present prevailing practice, no sane man will invest any substantial sums or build substantially as against the future upon unadjudicated patents except on terms contingent upon the outcome of litigation on the patent. Consequently, few, if any, sales of patent rights are made, or licenses granted under the same (except the dollar assignments from employee to employer) which do not contain provisions that the royalties or what not constituting the consideration from the purchaser or licensee will be modified or in many cases cease altogether, dependent upon the outcome of litigation over the patent. Furthermore, generally the patentee agrees to prosecute such litigation. The inevitable effect of each and every such agreement is to make the patentee, frequently the inventor, and all those attached to him, biased and unwilling witnesses to an infringer, just as our ad-

versaries claim the agreement of Exhibit 98 may have made Clutter biased and hostile. It may be said that Downie was fairer to the Defendant in that he took the affidavit which fixed and preserved the truth, whereas in these other agreements of which we speak, the inventor and those embarked with him are left at large to torture or fabricate their evidence in their own interests. No matter how reprehensible or unfortunate this practice may seem, it is necessary where, as so often happens, one branch of the Government overturns grants issued by the other. Trade in patent rights must continue and under these conditions no sound plan exists except one contingent upon the outcome of the litigation. Nobody more than the members of this Court knows how often the inventor is called as a key witness to establish the date of his invention against prior art set up to challenge his rights. Relative dates of invention and art are the storm centers of many patent rights and the litigation over the same. Such dates are the potential storm centers of all patent rights and the litigation over the same.

Such was the deal of Exhibit 98 and such was the purpose thereof, whether the Court considers it a deal for Clutter's improvement in a scoop—that is, a sub-combination of the machine—as it plainly says, or for Clutter's improvements, if any, in the entire machine as our adversaries insist and the Court apparently concluded. It must be remembered that while the Joplin machine was abandoned, the scoop as a sub-combination went on, after the Joplin work was concluded.

Nor is it any answer to say that Downie made the payments he had agreed to make after he found that the scoop too had been abandoned. The answer to this lies perhaps in the fact that Downie was honest and did what

he had agreed to do, although Clutter could deliver him no patent right that each thought could be delivered when the deal was made. Judge Hahn is authority for the holding that Downie dealt honestly with Clutter. (R. Vol. II, p. 1095.)

Nor is it any answer to say that the "rights" of Clutter in the Joplin scoop were collateral to the invention of the Downie patent, whether we accept the proposition that such related to the scoop itself or insist that it related to the entire combination because the value of patent rights are tied or grouped together where the devices which they cover are inter-related and inter-dependent, and when so inter-related and inter-dependent the invalidating of one reduces, if it does not destroy, the value of the other. It was known when the deal was made that, unless the Downie patent were sustained, Clutter's rights would have been valueless. This inter-relation and inter-dependence was recognized by this Court in *Wine vs. Enterprise*, 25 Fed. (2) 236.

III (c)

There is Literally No Limit to the Number or Character of Devices that Can be Relied Upon by a Defendant in a Patent Suit. If Conduct Without Regard to the Subject-Matter to Which it Applies is to be the Basis, There is Literally No Such Rule in Patent Cases as the Rule that Equity Will Not Range at Large to Avenge Wrongs.

There is still another situation peculiar to patent litigation that must be dealt with in these premises growing out of the wide range of defenses that are presentable and are presented in patent litigation, widening in compass and increasing in number as a patent right increases

in value as a result of successful litigation. This case presents an example of this situation. The Defendants rely upon no less than 129 prior patents, publications, etc., covering a field within whose compass literally thousands of items of defense, just as pertinent as the least pertinent, at least, of those relied upon, may be found within the confines of the United States, its territories and possessions, or within the great volume of published patents, trade journals, etc., the world over. Moreover, any of these not relied upon in the answer are admitted to a patent suit even up until within a few days of the trial and as in this case often even after the trial. Manifestly, some line must be drawn between which of these constitute a basis for applying the remedy for unclean hands and which not, or else the rule that equity will not range afield to right wrongs is a mere hollow rule in patent cases. There are literally thousands of devices, patent rights regarding any one of which, bought by the Plaintiff on a basis contingent upon the outcome of this litigation, would constitute a basis for the punishment by a court of equity. As we say, some line must be drawn and logically it should be drawn between what is pertinent to the patent in suit and what is not. The Joplin device would fall without this line, since it is a thing so manifestly impertinent to the validity of the patent that Judge Jones who ruled directly thereon and Judge Hahn whose holdings might at its worst to the Plaintiff be said to be a "Scotch Verdict," has each held the Downie patent valid in face of the proof furnished by Clutter and the other witnesses. Manifestly also a thing held to be an abandoned experiment under the same circumstances should also fall without the line. We recognize the saying of this Court that it is concerned with conduct and not anticipation, but as long as there is the rule that

equity will not range at large to right wrongs *the concern of the Court about conduct is inseparable from the conduct about what*—and that "what" must of necessity be something pertinent to the suit. It cannot be about every one of the thousands of devices, no matter how remote, that a defendant in a patent suit is permitted under the present practice to rely upon as a defense.

Indeed there is nothing to prevent a defendant, as defendants have in this case, ranging abroad after patents have been sustained to find that a patentee may have done something regarding a device, no matter how remote from the case, but in the patentee's general line of business, which may constitute grounds for the defense of unclean hands, and including that defense in the case. If the Court looks only to the conduct and not to the pertinency or impertinency of the device, no patentee who has ever done anything tainted in his line of endeavor is safe with his patent in a court of equity.

IV.

The Decree upon Rehearing in the Byers Case Stands Now as an Adjudication that there was No Unclean Hands and that the Downie Patent is Valid Regardless of such a Claim. How then Can there be Unclean Hands in Proceeding on that Decree in Other Cases?

In the case of *Toledo Scale Company vs. Computing Scale Company*, 261 U. S. 399, 67 L. Ed. 719, the Computing Scale Company had obtained a decree against the Toledo Scale Company in the Seventh Circuit restraining the Toledo Company from infringement of a patent. The Toledo Company moved for a rehearing on the ground of newly discovered evidence, the evidence being an alleged public use by one Phinney. The Toledo

Company explained their failure to earlier find the evidence by showing that all of the devices which had been manufactured by Phinney had been purchased by the Plaintiff and destroyed or concealed and that the Plaintiff had known of the alleged use throughout the litigation and suppressed the knowledge. The Motion for Rehearing was denied. Subsequently the Toledo Company filed suit in the United States District Court in Ohio charging the Computing Company with a conspiracy to suppress evidence, etc., and asking for an injunction restraining the enforcement of the decree obtained by the Computing Scale Company in the Seventh Circuit. This injunction was granted. The Seventh Circuit Court of Appeals then ordered that the Toledo Company be enjoined from prosecuting the suit in Ohio and ordered the entry of summary judgment on the final decree against the sureties. This ruling was taken to the Supreme Court on certiorari. The late Chief Justice Taft who delivered the opinion of the Court stated (page 421):

> "Do the additional facts averred in the bill filed in the Ohio court change the situation? It is said they show extrinsic fraud committed by the Computing Scale Company, upon proof of which a court of equity, although in another jurisdiction, having jurisdiction of the parties, may enjoin the one guilty of the fraud from profiting by a decree so obtained. There has been much discussion as to whether extrinsic fraud is here alleged, and the case of *United States vs. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93, is cited and numerous other authorities since that case."

(Page 423)

> "Another aspect of this record leads to the same conclusion. However nice the distinction between extrinsic and intrinsic fraud, *we have been*

cited to no case where it has been held that fraud is extrinsic when the court rendering the decree attacked had before it the same issue of fraud on the same facts, only a little more elaborated as to the motive of the party charged with committing it.

* * * * *

What the district court for northern Ohio was doing in hearing the injunction suit and issuing a temporary injunction was merely reviewing the discretion of the Circuit Court of Appeals of the Seventh Circuit in dealing with the same ultimate facts and reaching a different conclusion. This was beyond its province. *Embry v. Palmer*, 107 U. S. 3, 11, 27 L. Ed. 346, 349, 2 Sup. Ct. Rep. 25; *Telford vs. Brinkerhoff*, 163 Ill. 439, 443, 45 N. E. 156; *Marine Ins. Co. v. Hoggson*, 7 Cranch 332, 3 L. Ed. 362."

When the evidence of the Joplin work was presented to Judge Hahn, the question of suppression, etc., was not, or was thought not to be, squarely before the Court in the instant cases. Such seems to have been the view of most concerned because application was made to this Court to submit the matter in its entirety to Judge Jones in the *Byers* case. This Court upon that application ordered that the matter be submitted to Judge Jones with particular directions as to how it was to be handled, including the production of Clutter and Downie before Judge Jones in person. The parties went to much expense and trouble to carry out this order, and it was carried out to the letter. Clutter and Downie were produced before Judge Jones. He saw and heard them testify. He dismissed the charges of unclean hands and re-held the Downie patent valid and infringed, thus reaffirming his former holding with respect to that patent. No appeal was taken from this order though it was plainly an appealable order since it affected an injunc-

tion. The Byers Company made a lame attempt to get the matter before this Court, but between the argument and decision in the instant cases such attempt was dismissed. (The records of this Court in the *Byers* case mostly, if not entirely, made since the decrees were entered in the instant cases, are authority for these statements. See the order of Judges Dennison and Hicks, June 30, 1931, and the printed record filed in this Court by the Defendants in the *Byers* case in September, 1932.)

It seems to us an anomalous proceedings to declare that it was improper to proceed on the decree in the Byers case on the theory that it was improperly procured when that decree stands held properly procured by the Court having jurisdiction to hear and determine that question.

Conclusion: We think it fair to assume that those who advised Downie that he should proceed with his application* in the face of the Joplin work, that he should adduce the affidavit and take the other steps which he did take, were following well established and proper practices.

We think it fair to assume that Downie thought he was conforming to such advice and that as long as what he did recorded and preserved the truth it was proper.

If the Court thinks he exceeded the proper bounds, after all it was in the cause of recording and preserving the truth by the affidavit.

Defendants paid Clutter. He became, as Judge Hahn said, hostile to Plaintiff. In that mind he "horse-shedded" the other Joplin witnesses. Plaintiff paid Clutter to record and preserve the truth. He became hos-

* When Downie heard that a skimmer scoop had been added to a Keystone Clutter ditcher he—skilled in the art as he was—knew without further investigation two things, i. e., what was done at Joplin and that it was no good.

tile to Plaintiff. He did not suppress his evidence. He did not become biased against or hostile to defendants. The differences in payment are that defendants paid Clutter for his time and Plaintiff paid him for a quit claim on any patent rights on his scoop. The results were that Clutter served defendants and did all he could against Plaintiff. The different plans of payment had the result that he, Clutter, became hostile to the Plaintiff and not the defendant. The over all result was that the truth was preserved and recorded for the Court where certainly we would have had fabricated or tortured evidence.

Be these things as they may:

How can it be improper to proceed on a decree held to be properly procured? And we think in any event it is clear under the authorities that whatever "irregularity" there was should be limited to patent No. 1,511,114.

Respectfully submitted,

W. H. Boyd,
F. O. Richey,
H. F. McNenny,
*For Plaintiff.**

Richey & Watts,
Boyd, Brooks & Wickham,
Solicitors for Plaintiff.

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* Mr. May, who formerly represented plaintiff in this matter of "unclean hands," died December 25, 1932, and that is the reason why his name is not appended hereto.

ORDER DENYING PETITION FOR REHEARING

(Filed February 9, 1933)

Before HICKS, HICKENLOOPER and SIMONS, Circuit Judges.

IT IS ORDERED, That the petition for rehearing in the above-entitled causes be denied upon the grounds set forth in the memorandum filed herewith.

MEMORANDUM ON ORDER DENYING PETITION FOR REHEARING

(Filed February 9, 1933)

Before HICKS, HICKENLOOPER and SIMONS, Circuit Judges.

Two principal contentions are advanced in support of the petition for rehearing. The first is that the original action is founded upon alleged infringement of five patents and that the bill should not be dismissed as to the four patents to which the "unclean hands" had no application. The cases cited are not precisely in point. *In re Meyerfield*, 46 F. (2d) 665, pertained to a claim in bankruptcy in which the claimant before the referee forged a deed and offered it in evidence to support his claim. He also claimed by reason of a resulting trust, and it was held that proof of the forgery did not preclude his recovery under the resulting trust. In this case the claimant did not undertake to initiate proceedings for his own relief in a court of equity. He was brought into such a court against his will and founded his claim upon two contentions as to one of which he fabricated evidence. The relief which was sought on the alleged resulting trust theory in no sense could be said to be

"founded on the unlawful thing done or intended to be done." *Woodward* v. *Woodward*, 41 N. J. Eq. 224, was a divorce proceeding and therefore not strictly an action in equity. *Munn & Co.* v. *Americana Co.*, 83 N. J. Eq. 309, was a case in which action was brought upon two grounds of relief, as to one of which plaintiff was held not to be entitled to a decree. *Mattschappij* v. *Kosloff*, 45 F. (2d) 94 (C. C. A. 2), uses language which is broad enough to justify plaintiff's position but which was obviously used without direct reference to the precise question we must here consider.

Prior to the adoption of the new Equity Rules, the question could never have arisen for a bill covering multiple causes of action would have been bad for duplicity. Such new Equity Rules are not intended to change the general nature and characteristics of a court of equity as a court of conscience in which the granting of relief is largely discretionary and the court is not bound by hard and fast rules. *Cf. Pope Mfg. Co.* v. *Gormully*, 144 U. S. 224, 236-7. It is true that a system of equity practice has grown up and that present-day courts are inclined to follow precedents rather strictly. On the other hand, we have not held any of the patents in suit invalid nor adjudicated any of the rights of the parties *inter sese*. The doctrine which we have applied is simply that if one, as actor, seeks to set the judicial machinery in a court of equity in motion upon grounds in respect to which his conduct is sullied he will find the doors of the court closed against him. The bar is said to be "*in limine*." The plaintiff is repelled as of the date of the filing of the bill and in respect of the maintenance of the action then instituted, because he does not then appeal to the court as one in whose behalf the largely discretionary powers of the court should be exercised. The fact that delay is thereby occasioned, or that the plaintiff has thereby suffered a loss of time and expense, is immaterial. The court has simply said: "We will hear you in this action although, not being a general avenger of the wrongs of humanity, it may be that you will not be in the future, and would not have been in the past, repelled on account of and but for your conduct."

The opinion already rendered sufficiently answers the contention that the reprehensible conduct was not really necessary and the Joplin use was not really an anticipation.

Memorandum on Order Denying Petition for Rehearing

The second material contention is that we have dismissed an application for rehearing in the Byers case, in which it was sought to bring up this evidence of unclean hands; that this is in effect an affirmance of the interlocutory decree in that case, and an adherence to the position taken in our prior affirmance of such interlocutory decree; that the position thus taken thereby becomes the law of the case, and that there is a hopeless inconsistency in holding that the conduct of the plaintiff does not bar recovery in the Byers case but does bar recovery in the present cases. There are several *non sequiturs* in the position thus stated. The decree previously reviewed by our court in the Byers case was interlocutory in its nature and the questions then presented may again be considered when and if the case is brought up upon final decree. This court has permitted the evidence of unclean hands to be presented in the court below and that court to consider the matter of the Joplin use in its bearing upon the defenses of anticipation and prior public use. We have held in the present cases that the plaintiff was barred not by its failure to disclose this prior use, if it was such, but by the advantage which it sought to take of a decree of validity obtained in the manner stated. With the introduction in evidence of all the pertinent facts both the earlier decree of the District Court and the affirmance by this court lose their efficacy as controlling factors (the law of the case) in subsequent decisions either in the District Court or here. But were this not so, it is obvious that applications for rehearing are addressed solely to the discretion of the court and a refusal to take such a matter up at the present time, in the exercise of a sound discretion, creates no inconsistency and will not bar the court from considering it later. For the reasons stated the petition for rehearing is denied.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, J. W. MENZIES, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings in the cases of *The General Excavator Co.* v. *Keystone Driller Co.* No. 6065, *Keystone Driller Co.* v. *The General Excavator Co.* No. 6066, *The Osgood Company* v. *Keystone Driller Co.* No. 6067, *Keystone Driller Co.* v. *The Osgood Company* No. 6068., as the same remains upon the files and records of said United States' Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 15th day of March, A.D. 1933.

J. W. MENZIES,

Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

(SEAL)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 34

ORDER ALLOWING CERTIORARI—Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 35

ORDER ALLOWING CERTIORARI—Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 36

ORDER ALLOWING CERTIORARI—Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1933

No. 37

ORDER ALLOWING CERTIORARI—Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO RECORD—Filed July 7, 1933

It is hereby stipulated and agreed by and between counsel for the respective parties to the above entitled causes that the incomplete volumes III and IV of the record in the above causes as filed in the Circuit Court of Appeals, and as recovered and filed in this Honorable Court with the petition for certiorari, may be used at the hearing on the merits of the above causes.

Richey & Watts, Counsel for Petitioner. Corbett & Mahoney, Counsel for Respondents.

[File endorsement omitted.]